

THEORY OF RELATIONS AND
FUNCTIONS AND DERIVATIVES

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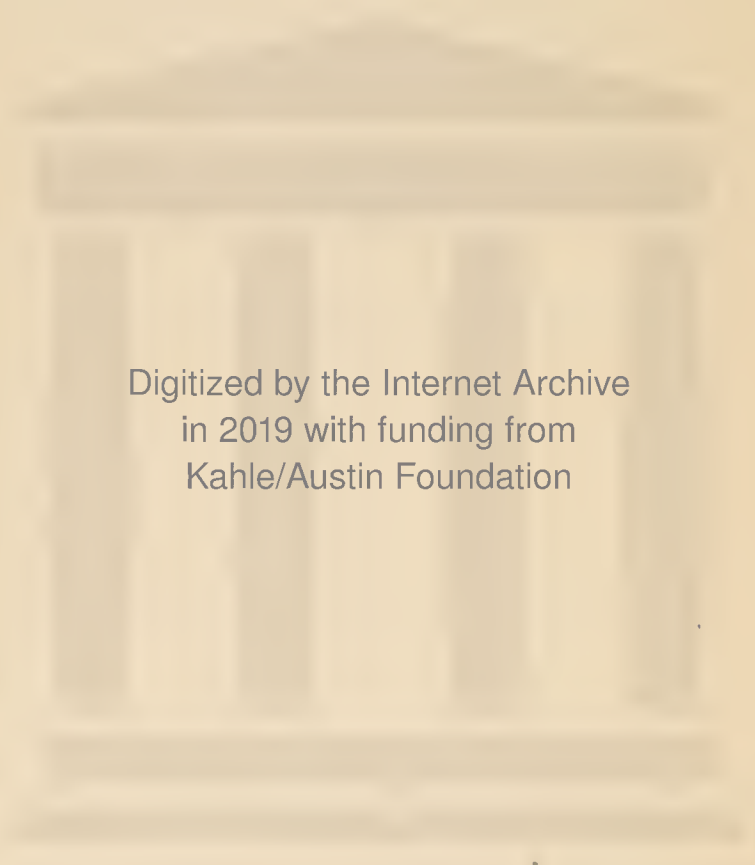


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The Law Relating to Authors and Publishers

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WITH A FOREWORD BY

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FOREWORD.

A LITTLE knowledge is not always a dangerous thing.

The aim of this book is not to make every author his own lawyer, but to show authors approximately where they stand when confronted with some of the many difficulties that may and do arise during the pursuit of their calling. The book seems to me so good that I recommend it very strongly to the attention of all who are engaged in the trade of authorship. So far as I am able to judge, it is sound from start to finish; and certainly I myself have never yet met with explanations and expositions that render the legal aspect of affairs so clear and comprehensible to a lay mind.

Authors and publishers (as the creators, owners and producers of literary or artistic work) are, perhaps, too apt to consider that, so far as the law is concerned, their property is different from every other kind of property. In showing where this is true, where it is only partially true, and where it is an altogether erroneous supposition, the writers of the book will, I believe, dissipate a very usual confusion of thought. Clients and lawyers may alike be grateful to them for doing so.

If I have not ventured to say any more, it is because I feel that this foreword is really superfluous and that the book itself is its own, and the best, recommendation.

I wish it every possible success.

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March 26, 1927.

(Chairman of the Incorporated
Society of Authors, Play-
wrights and Composers).

AUTHORS' PREFACE.

IN preparing this little book on law as it affects two branches of the profession of letters the authors have had before them two aims: the one to be practical, the other to be readable.

It goes without saying that the endeavour to be readable almost necessarily involves the sacrifice of some of the exactness and conciseness which are the lawyer's ideal when working for and among his own fraternity; whilst one result of the endeavour to be practical is that far greater prominence is given to the Law of Copyright, which is exclusively authors' law, than to the Law of Libel which affects all the world.

The present book is to be followed by a companion volume, "The Law Relating to Printers"; but just as a large proportion of the matter in this book applies quite as much to printers as to authors, so in the second volume, subjects such as "Printers' Contracts with Publishers," "Proof Correction," and "Printers' Lien over Manuscript," may be of equal interest to authors and publishers.

In attempting to cover so much ground in so little space, the authors recognize that the law which they have set out is at many points little more than an outline; but they believe that this is not necessarily a fault, and they hope that in spite of defects their work may be of interest and use to the profession for which it has been written.

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April, 1927.

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THE LAW RELATING TO AUTHORS AND PUBLISHERS.

CHAPTER I.

CONTRACTUAL RELATIONS OF AUTHORS AND PUBLISHERS.

Generally.

It is difficult to deal with this subject without a general survey of the Law of Contract and this clearly cannot be attempted in a volume of the present size.

The plan adopted instead is to deal on broad lines with the question of the "formation of contracts," and then to select the particular points that have led to litigation in which authors have been concerned.

The authors have endeavoured to avoid excursions into the general Law of Contract, except in so far as it was impossible otherwise to explain the particular application.

Formation of Contract.

The law requires certain contracts to be embodied in the form of deeds, others must be written, while in the vast majority of cases a clear and unqualified verbal agreement consisting of an offer and an acceptance may be enforced; provided the agreement is supported by "consideration" of some kind, the parties are fully capable of contracting, and their object is entirely lawful.

Deeds.

A deed is rarely needed for a commercial contract, but it may be observed that it has this important effect in law. Whereas a gratuitous promise (i.e. an agreement unsupported by legal consideration) is not ordinarily enforceable, yet if it is embodied in a deed, and made "under seal," the law will no longer inquire into the consideration, but will give the force of a binding obligation to the gratuitous promise.

Statutes of Limitation.

The other principal characteristic of a contract by deed (or an agreement made under seal) is that an action arising from such a

contract may be brought at any time within twenty years from when the cause of action first existed; and this period may be prolonged, and reckoned afresh from the date of any written acknowledgment of a debt or part payment of the sum due.

Where on the other hand the debt arose from an ordinary contract, whether written or verbal, the right of action is barred if not exercised within six years; and here again the right of action may be revived by acknowledgment.

Again an agent with authority to execute deeds can only be appointed by deed; while in certain other special cases such as transfers of British ships, and leases of lands for over three years, deeds are essential in every case by statutory requirement.

Agreements that must be Stamped.

As considerable uncertainty arises at times concerning the necessity of stamping contracts and agreements, especially when these are contained in ordinary correspondence, it may be of value to state the more important statutory provisions.

The consolidating Act in force on the point is the Stamp Act 1891, while certain of the later Finance Acts have contained amendments. The first schedule of the Act contains the following: "There is a stamp duty of sixpence upon every agreement or memorandum of an Agreement made in England under hand only (i.e. not under seal) and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument."

Exemptions.

The following are exempted from the operation of the rule:—

(1) Agreement or memorandum the matter whereof is not of the value of £5.

(It will not be enough to state that the value was unascertainable at the time; to come within the exemption the subject matter must be shown affirmatively to be less than £5.)

(2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer or menial servant.

(An overseer in a printing office has been ruled an artificer.¹)

(3) Agreement letter or memorandum made for or relating to the sale of goods.

(Hire-purchase agreements are not included in this exemption.)

There are a number of special statutory exemptions in addition, which it is not within the scope of the present work to detail.

In the case of many important instruments such as bonds, covenants, conveyances, leases and mortgages there are substantial duties to be paid, calculated on the value of the subject-matter, but again it is unnecessary to discuss these here, since such instruments may only be prepared by competent legal persons; and the Act

¹ Bishop v. Letts [1858], 1 F. & F. 401.

itself provides a £50 penalty for unqualified persons preparing instruments relating to real or personal estate, etc.

Enforcing Unstamped Agreements.

The principal difficulty which is likely to arise from the neglect of stamping an agreement, is in respect of later disputes and litigation.

The Stamp Act provides¹ that upon production of an instrument chargeable with duty as evidence in any court, the Judge is to take notice of any omission or insufficiency of stamping. If the instrument is one which may be legally stamped after execution, it may then be stamped on payment of the duty, a penalty of £10, and a further sum of £1; then and only then it may be received as evidence.

In the case of conveyances, etc., there may be a further penalty equivalent to the unpaid stamp duty, but reference must be made to the Act itself for details of the particular offences and the pains and penalties incurred. The Commissioners of Inland Revenue have wide powers of mitigation and remission of penalties in proper cases.

Printing Contracts.

In this connection, a point of practical importance arises, hinging on this question: Is a printing contract in the eye of the law a contract for the "sale of goods," or is it a contract of "work and labour"?

If the former, then it is unenforceable in many cases without written evidence under the Sale of Goods Act (see p. 6).

If the latter, writing is not necessary, and oral evidence would suffice, but *if there is* a written agreement it must be stamped.

The question is a most thorny one, and far from being conclusively settled for all purposes. The position is probably this; in all ordinary cases printing contracts are regarded as contracts for the sale of "future goods"; but there is an important High Court decision of seventy years' standing that they are contracts of "work and labour," and in case of need it is always open to the printer who has accepted an order without any written evidence to rely upon that decision.^{2 3}

The implications of this curious position will be discussed fully in "The Law relating to Printers."

Writing.

Written evidence of the existence of a contract is required by law in a large number of cases. An example of this which is of

¹ Stamp Act [1891], Sec. 14.

² *Clay v. Yates* [1856], 25 L.J. Ex. 237.

³ *Lee v. Griffin* [1861], 30 L.J. Q.B. 254.

particular importance to authors will be considered in a later chapter, namely, that every assignment of copyright under the Copyright Act 1911 must be in writing.¹ There are a number of other special cases, but there are also two cases of general importance which must be closely considered and permanently borne in mind; these are under the Statute of Frauds and the Sale of Goods Act respectively.

Statute of Frauds.

The first arises under an old statute of Charles II, viz., section 4 of the famous Statute of Frauds 1677. This Act lays down five sorts of contracts which are unenforceable without written evidence. These are: a promise by an executor to pay damages out of his own estate, a promise of guarantee, an agreement made in consideration of marriage (other than the actual promise of marriage), contracts for the sale of land, and finally, and most important of all, agreements not to be performed within one year from the date when they were made.

Contracts that are absolutely indefinite as to date (e.g. for maintenance of a separated wife) are not within the statute, but contracts for a definite period which extends beyond the year must be in writing, although they might be determined by notice earlier.

The following case is one where the statute necessarily applies, although it is not entirely free from difficulty. A journalist is taken on the staff of a periodical, with a condition that on leaving this service he shall not accept employment in the same capacity and in the same town for two years.² This condition brings the contract within the Act, and makes it unenforceable, if it is entirely oral.

Form of Contract.

Any written memorandum signed by the party who is being sued, or by his agent will suffice, provided the names of the parties and the terms of the contract appear, including the consideration. As the writing is only required as *evidence* of the contract, it does not matter if the memorandum is altogether later in date than the agreement itself; and a document *repudiating* liability under the contract may furnish the evidence required provided it embodies the necessary particulars. Thus if a letter is sent to a newly-engaged member of a publisher's staff, saying that his conduct is so unsatisfactory that remuneration at a stated rate for the intended term of three years cannot continue, and that the employee may either terminate his service or accept different conditions, would probably be sufficient evidence to enable the employee to sue on the original contract of service.

¹ Sec. 5 (2), see p. 119.

² *Reeve v. Jennings* [1910], 2 K.B. 522.

Again the memorandum may be contained in two or more documents, provided they are connected and obviously refer to one another; but any verbal explanation or addition will not be allowed. Thus where a letter omitted the name of the person to whom it was addressed, the envelope in which it had been sent was allowed as evidence, in order to complete the memorandum.¹

In another leading case a bookseller wished to obtain subscribers for a proposed illustrated edition of Shakespeare.² He issued prospectuses with all particulars and at the same time kept a book in his shop for the signature of intending subscribers. It was held that there was nothing to connect the book with the prospectus, and that no verbal explanation could be accepted for the purpose. The rule is not as strictly applied now as formerly and it is possible that a different decision would be given to-day on the facts stated; but it is certain that if (as in this case) further evidence as to the *extent* of the defendant's liability was sought to be introduced, the court would unhesitatingly reject it.

Contracts of Guarantee.

Amongst the specified cases of contracts which are unenforceable without written evidence was mentioned a "promise of guarantee." The Statute reads: "Any promise to answer the debt default or miscarriage of another person"; and one or two points in reference to this clause should particularly be noted, as confusion sometimes arises between an "indemnity" and a "guarantee."

An indemnity is an undertaking between two parties, e.g. an author and a publisher concerning liability for infringement of copyright.

A guarantee implies three parties, e.g. a banker who guarantees to the author that certain payments will be made when due from the publisher.

A promise of an *indemnity* is distinguishable from a *guarantee*, and such a promise needs no writing. The leading case on the subject illustrates the difference neatly. A series of bills of exchange drawn on a firm of shippers had been accepted by the plaintiff, on the defendant's written *guarantee* that if called upon to do so he himself would meet the bills as and when they fell due.

Here there were three active parties, and the case was one of ordinary guarantee. But at a later stage the firm of shippers were regarded as so very "doubtful" that this was not enough, and the defendants then said that if the plaintiff would accept the bills they would "see that funds were provided." The firm of shippers now became a mere figurehead, and the contract between the other parties was one of indemnity, and no writing was needed.³

¹ Pearce v. Gardner [1897], 1 Q.B. 688.

² Boydell v. Drummond [1809], 11 East, 142.

³ Guild v. Conrad [1894], 2 Q.B. 884.

Similarly in any contract of sale, if the person giving the promise really makes himself primarily answerable, and the seller looks to him first, and never expects payment from the person who received the goods, it is an indemnity and not a guarantee, and writing is not essential.

In cases of guarantee the consideration need not appear,¹ in contrast to the other four cases, in which it is essential.

Sale of Goods Act 1893.

Amongst many other important provisions, this Act reproduces another section of the Statute of Frauds, which is more fully dealt with in "The Law relating to Printers." The gist of this section is, that to enforce contracts to sell goods of a value of £10 or over, there must be written evidence, unless the contract has been recognized in some other way, as by acceptance of the goods or part payment.

¹ Mercantile Law Amendment Act [1856], Sec. 3.

CHAPTER II.

AUTHORS' ASSIGNMENTS.

Having thus briefly considered the most important cases in which the law requires written evidence of contracts, it is proposed to deal with certain special matters arising in reference to authors' contracts, adding a short statement of the general law wherever this is necessary to explain the particular application.

Assignability.

Assignments of contract are permitted by law in certain cases. The question falls under two heads. (A) The rights and benefit under the contract (e.g. the right to recover repayment of debt, which may be assigned under statutory provision, enabling the assignee to sue the original debtor in his own name¹). (B) The liability under a contract (e.g. a promise to carry out particular work); and considerably greater difficulties arise here than in the former case.

With regard to this the general law precludes the assignment of an undertaking to do work for which a party was selected on his *personal qualifications*; and clearly it would be in the highest degree unsatisfactory to allow an author for example to assign his duties, without the full knowledge and consent² of the other contracting party.

If the author die any incomplete contract is discharged, and his executors are free from liability.³ This is perhaps obvious; but what is the position where the author is made a bankrupt? It has been decided that here, too, his assignees in bankruptcy have no power either to make him complete his contract or to undertake it themselves.⁴

Sir Walter Scott's Publishers.

In the last quoted case the whole effect of bankruptcy on the part of either author or publisher was carefully considered. This case was decided in 1841, and the discussion in Court centred on difficulties which had arisen between the late Sir Walter Scott and his booksellers who had become bankrupt.

¹ Law of Property Act 1925, Sec. 136.

² *Robson v. Drummond* [1831], 2 B. and Ad. 303.

³ *Marshall v. Broadhurst* [1831], 9 L.J. (O.S.), Ex. 105.

⁴ *Gibson v. Carruthers* [1841], 8 M. and W. 321.

Baron Abinger expressed himself as follows : " Sir Walter Scott had engaged to write a novel, which they were to have the benefit of publishing and in consideration of which they were to pay him £4,000, for which sum they had accepted bills drawn by him upon them in anticipation. Before the work was finished they became bankrupt, whereupon Sir Walter Scott took up all the bills which he had negotiated.

" Upon the conclusion of his work, and when it was ready for the press, the assignees in bankruptcy of the booksellers contended that by virtue of the contract they had a right to the profit of publication, which they were ready to undertake. Sir Walter suggested several grounds to show that the credit, the skill, the judgment, integrity and personal character and reputation of a publisher were matters of great importance to an author, on which the success and reputation of his own works might greatly depend, and therefore insisted that since a part of the consideration for his contract lay in the personal credit and qualities of the booksellers, he was by their bankruptcy discharged from the contract.

" I must own," added the Judge, " that his reasoning appeared satisfactory to me ; but a more obvious illustration of the principle upon which it rested would have been afforded by reversing the case, and supposing that Sir Walter Scott had been the bankrupt and his booksellers solvent, would they have been content to pay their £4,000, and take the risk of publishing a novel written by the assignees of the novelist?"

A full consideration of the law underlying these statements makes it almost unnecessary to add that it makes no difference if the publisher is a limited company,¹ since the contract is a personal one and cannot be assigned on either side. Conversely if it is clear that if no personal qualifications arise, as in the printing of hand-bills, there can be no objection if the printer gets the work done by a sub-contractor. But the printer will still be liable for bad work, and he alone can sue for payment.²

Cheques as Assignments of Copyright.

Assignments of copyright are considered in some detail in a later chapter. These may take different forms according to the requirements and experience of the parties. Thus in many cases publishers or newspaper proprietors will use specially prepared cheques for paying authors and journalists. These cheques carry a printed endorsement which purports to be the assignment when completed by the author's signature. This may pass " World-rights," or " United Kingdom rights," or " All Serial Rights."

Curiously enough it does not appear that the latter term has

¹ Griffith v. Tower Publishing Co. [1897], 1 Ch. 21.

² British Wagon Co. v. Lea [1880], 5 Q.B.D. 149.

ever been legally construed. On the face of it, an assignment of serial rights passes only the rights to publish short contributions in their existing form, and long contributions in a series of comparatively short parts. This then may be held to reserve to the author the right of "Volume publication," whether of a large number of short contributions, or of a story in book form, and therefore it is not an assignment of copyright. This point was made in the case of "*re* Jude's Musical Compositions" where volume rights only had been sold.¹

Contracts of Service and Volume Rights.

Where an author is under a contract of service the copyright in work so produced vests automatically in his employer by Section 5 of the Copyright Act 1911,² but subject to the following saving clause:—

"Where the work is an article or other contribution there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain publication, otherwise than as part of a newspaper, magazine or similar periodical."

In other words "volume rights" for collected works are excluded from the employer's copyright, although the "serial rights" pass without any assignment. Yet the *author* cannot exercise the volume rights because the copyright is not in him, but merely a right to restrain; and thus it would appear that until a special agreement is arrived at these rights are in suspense and cannot be exercised by anyone.

Receipts as Assignments.

In general it may be said that a signed receipt forms a sufficient memorandum of assignment to satisfy the Copyright Act. Thus: "Received of Messrs.—the sum of £2 6s. 6d., for five original card designs inclusive of all copyrights; subjects:—four golfing subjects, one Teddy Bear painting (signed)."³ But in every case it must be possible to identify the subject matter with sufficient accuracy.

It is of course open to every author who is satisfied that his standing warrants such a course, to alter his publisher's endorsement of cheques to suit his own views, even in spite of the fact that some of his publishers in their turn will mark their endorsements "not to be altered."

Syndication.

A further difficulty for authors arises in respect of what is known as "syndication." The amalgamation of commercial

¹ *Re* Jude's Musical Compositions [1907], 1 Ch. 651.

² See p. 119.

³ *Savory v. World of Golf* [1914], 2 Ch. 566.

interests on a large scale is one of the most important features of modern industrial development. This applies as much to the proprietorship of newspapers, periodicals, and other publishing concerns, as to any other body of commercial interests, and directly affects authors in the following manner.

A contribution is offered to, and accepted by the editorial department of a London newspaper. In due course the author receives his cheque signed on behalf of an amalgamated concern, and will not be surprised to find that his work, which he intended for publication in one paper, and which was paid for on that scale, appears at intervals in three or four other publications in various parts of the country. Unless the author can show that he was deliberately deceived he appears to be without a remedy.

Unauthorised Alterations.

Although an author has assigned his copyright in a certain work there is at least one important right which he retains. This is that his work shall not be materially altered without his consent.¹ The right is based upon a Common Law principle discussed in a later chapter, that every man has a right to insist that work shall not be "passed off" under his name when in fact it is substantially different from what he originally produced.

In the leading case on the point it was said² that although a publisher might own the copyright, the author would still have his action for injury to his reputation if his work were inaccurately published, and thus a false representation as to authorship were publicly made.

No doubt, however, this point should be taken subject to considerable reserve. If the work of an unknown journalist is altered and published without the author's name it will be difficult for him to show any right of action at all, since if he is not publicly known it cannot be said that his reputation has been injured.

The application of the principle is seen in the difficulties which have from time to time been placed in the way of the producers of wireless entertainments in respect of the curtailment of plays and other work which becomes necessary in preparing timed programmes.

Some publicity has recently been given to at least one such case and the authors are indebted to the courtesy of the Copyright Department of the now defunct British Broadcasting Company for information on the subject.

It appears that a playwright of standing has been able effectively to prevent his work being "cut" to fit the schedule of times allotted, in spite of his previous assignment of "Broadcasting Rights"; and in view of the impossible position created, the company have been

¹ *Preston v. Raphael Tuck* [1926], 1 Ch. 667, pp. 42, 75 and 89 *post*.

² *Archbold v. Sweet* [1832], 5 Car. & P. 219.

forced to insert a general stipulation in their contracts that these curtailments shall not be objected to.

Publisher's Agreements.

The law as to assignments of copyright requires that any such assignment shall be specific and shall be made in writing. The exceptional case of an "equitable" as opposed to a "legal" assignment only arises where the assignee is in a position immediately to enforce the written assignment as a contractual right.¹

Accordingly it has been held² that where the proprietor of the copyright in a series of musical publications called "Music and the Higher Life" assigned "the sole and exclusive rights" of printing and publishing "the series in *volume form* only, in consideration of the publishers bearing all the expenses and paying a royalty of sixpence on every copy sold," this was an agreement to publish, and not an "assignment of copyright." This distinction is of vital importance to the author, since it implies that on breach or termination of the agreement he may reclaim his full rights, and also at all times he retains his "serial rights."

Lien on Copyright.

A recent decision of Mr. Justice McCardie's upon an author's rights in respect of his deed of assignment of copyright, where the publishers subsequently sold their business, is also worth close consideration.³

The author had assigned an exclusive right of publication, and made the publishers sole owners of the copyright. The company made an allotment of shares in part payment and covenanted to pay royalties and further that they would not dispose of the copyright except subject to the terms of that agreement.

Some time later the company disposed of their business including the copyright in the book "so far only as the vendors had any right to sell," and "subject to all equitable or other claims thereon." The purchaser having acquired the business denied that he was liable to pay the royalties reserved by the original deed.

Two important points at least are illustrated here. The first is that no one can be sued on a contract unless he is a party thereto. For instance it often happens that a manufacturer sells to a retailer with a condition that the goods are not to be resold under a fixed minimum; then if the retailer sells to a purchaser with notice of this condition, and the purchaser in his turn makes a third contract of sale at a cut price and deliberately ignores the manufacturer's

¹ See p. 69 *post*.

² *Re Jude's Musical Compositions* [1907], 1 Ch. 651.

³ *Barker v. Stickney* [1918], 2 K.B. 356.

Barker v. Stickney [1919], 1 K.B. 121.

condition, the manufacturer has no remedy. The reason is that there was no contract between the manufacturer and the *second* purchaser.¹ The retailer on the other hand had privity of contract with the offender and could sue if he wished to do so. So here on the same principle the author could not enforce his rights under the original deed, against the successor in business of the publishers.

The second important contention was that in the circumstances the author had a lien, or charge upon the copyright, for payment of the agreed royalties. The learned Judge said that this point had caused him great difficulty, but found ultimately that no such lien could be implied. He said "I venture to think that a mere covenant to make a payment out of property will not, without more, make the payments a charge upon the property"; and in another passage "No vendor's lien will be created by the mere reservation in the assignment of future royalties, or even by provision as to the obligations of second or later assignees."

It is possible that if the original deed had not constituted the publishers sole owners of the copyright, and if it had expressed that the royalties were to be paid "as part of the purchase money" the author's claim would have been upheld.

When the case went to Appeal it was strenuously argued that although an unpaid vendor's lien or incumbrance cannot ordinarily attach to goods, as it does to land, yet copyright ought to form an exception because of its special nature. The Lords Justices rejected this view and upheld the judgment of the Court below.

Mortgage of Copyright.

But although an unpaid vendor's lien cannot attach to copyright it appears that copyright may be made the subject of mortgage. Thus an author can mortgage all his rights in any composition as security for the repayment of a debt, and the rights acquired by the mortgagee will be subject to the author's "equity of redemption."² It is certainly somewhat anomalous that in one set of circumstances principles which usually relate exclusively to land should be allowed to attach to copyright, and that in other very similar circumstances such principles should be rejected.

¹ *Dunlop v. Selfridge* [1915], A.C. 847.

² *Re Jude's Musical Compositions* [1907], 1 Ch. 651.

CHAPTER III.

BREACH OF CONTRACT.

Publishers' Options.

Closely connected in law with the cases at the end of the previous chapter came another one in 1920. This also concerned rights attaching to an author's work after a breach of covenant.¹ Here an author had entered into a written agreement with the plaintiffs to publish a novel, and by the same agreement he had given them an option to publish his next three books upon certain royalty terms.

Six months later the author entered into another agreement with a second firm of publishers whereby *they* were to publish the next three books he should write *after completion of his agreement* with the plaintiffs.

The author then purported to satisfy the first agreement by sending to the plaintiffs a sociological book, and two collections, one of stories and the other of verses, both of which he had already published. Meanwhile he was writing his second novel, and in due course he sent it to the second publisher, who set up the type and sent proofs to him.

This firm had notice of the prior agreement throughout and were made co-defendants with the author. Their first contention at the trial was that the agreement had been complied with. Needless to say, the Judge held that the author had not complied with his obligation to offer "his next three books," by sending in what he termed "these relics of his literary efforts of the past."

The next contention of the defence was that the plaintiffs were endeavouring to obtain specific performance of a contract of personal service, and it is settled law that while the Courts will in proper cases give damages, they will not order the carrying out of a contract which they are powerless to enforce. This however it was decided was not a contract of that kind; it was an undertaking to hand over the products of labour for a consideration, and similar in principle (said the Judge) to a contract by a farmer to sell a future crop! The author was bound by his undertaking to hand over the manuscript of the novel in dispute to his first publishers, the plaintiffs.

Finally, and this was the real difficulty, the second publishers

¹ *Erskine Macdonald, Ltd., v. Eyles* [1921], 1 Ch. 631.

contended that they were in no way bound by the first agreement to which they were not a party. The judge, however, pointed out that the agreement provided specifically that upon exercising their option, the plaintiffs should have exclusive rights of production, and of suing in respect of infringement of copyright. Thus the plaintiffs *definitely owned an option to become entitled to an interest in the copyright*, which the law would protect irrespective of other agreements by the author.

The plaintiffs obtained an injunction restraining publication elsewhere until they should have had the first offer of the new novel and had refused it.

Story sold to two Publishers.

The breach of contract which gave rise to the next case was somewhat different. Here the author had agreed to sell the complete copyright in an 80,000-word story to the plaintiffs for £200. The typescript was delivered, and pending a dispute about the number of words, the publishers withheld a part of the price. Meantime the author sold the volume-rights in the story to another publisher, who bought without notice of the existing agreement.¹

It was held in the judgment that the agreement constituted a good equitable assignment of copyright (since it gave the plaintiffs a right to compel a legal assignment of the copyright in the story when written) and the plaintiffs were entitled to an injunction against the second publishers.

The case also fell under the provisions for "authorship under a contract of employment," which it will be seen automatically vest the copyright in the employer. But had their case rested upon employment alone it could not have succeeded, since the work had not been paid for in full at the time. It should also be added that this part of the judgment is based upon a very doubtful application of the principle involved.²

Work under Employment.

This point when it comes to be directly in issue may easily lead to considerable difficulty. Thus a professional searcher of records was in the habit of taking notes of the records he investigated, and supplying his employers with a transcript.³ The employer felt, not unnaturally, that as he paid for the work he was entitled to the original notes. He sued for them accordingly but lost his action, it being held that in the absence of any express stipulation, the notes were the property of the searcher.

¹ Ward Lock v. Long [1906], 2 Ch. 550.

² Crawford v. Paton [1911], C. Sess. (Sc.) 1017.

³ *Vide* the explanation of Copyright Act 1911, Sec. 5 (1) b, *post* p. 67 and the distinction of serial rights from volume rights, *ante* p. 9.

Again, where a proprietor of an encyclopædia employs and pays an author to compose his articles, the question whether the copyright is in the proprietor or in the author is a question of fact and not of law. No writing nor express words need be used (as in assignment of copyright), but the Court must take all the surrounding circumstances into consideration and draw the proper inference from this evidence.¹

Breach of Contract to Publish in Book Form.

In a 1921 case decided in the Court of Appeal², the position was considered where publishers had agreed to publish a series of articles by a champion runner, and another athlete. These were to appear, and did appear in the *Badminton Magazine*, but in their contract the publishers had further undertaken to publish the collected articles in book form, paying a royalty of fourpence on each copy of the book sold.

The publishers ultimately refused to publish the book, and the breach of contract being clearly established the difficult question of assessment of damages arose. The defendants paid £25 into Court with a denial of liability, and their counsel argued that the obligation (if any) would have been satisfied by the publication of one single copy. Mr. Justice Sankey however thought otherwise and awarded £500 damages, representing an issue of 30,000 copies, each bearing a royalty of fourpence. The Court of Appeal regarded this estimate as excessive, and decided that the defendants were bound only to publish such a number as was reasonable in all the circumstances, but refused to make a calculation based upon the smallest number of copies that could be described as a publication.

They awarded £100 and even this was not without comments on the part of at least one member of the Court, suggesting that the plaintiffs might have received considerably less if the book had actually been published.

Warranty of Copyright.

Every publisher who buys copy for publication is necessarily taking a certain risk, and the fact that he has received proper assurances by no means protects him from an action for infringement of copyright; although no doubt he in turn can base an action for damages on such assurance.

This point was illustrated years ago in a purported sale of one of Captain Marryat's novels after the author's death.³ It appeared in evidence that a sum of £50 was paid, and the receipt was in these terms: "For permission to publish Captain Marryat's work

¹ *Lawrence & Bullen, Ltd. v. Aflalo* [1904], A.C. 17.

² *Abrahams v. Herbert Reich* [1922], 1 K.B. 477.

³ *Sims v. Marryat* [1851], 20 L.J. Q.B. 454.

‘Monsieur Violet’ so long as the copyright may endure, that right to be in any case exclusively the publisher’s for ten years.” This receipt was held to constitute an express warranty of copyright on the part of the defendant who was the deceased author’s heir-at-law.

In point of fact Captain Marryat had within his lifetime assigned the copyright of this book of adventures to another party in consideration of a payment of £300, and the agreement made subsequently therefore passed nothing at all, except a right to sue the heir.

Discontinuance of Publication.

An important publishing case is usually cited as authority for claims on the basis of a *quantum meruit*,¹ i.e. the amount earned when only a part of the work is carried out. The principle involved is this: If a person contracts to do a thing, he has no claim at all for payment until he has completed his part of the contract. And if he is unavoidably prevented from such completion after carrying out say three-quarters of the work he still has ordinarily no claim for a *pro rata* payment.

To this there are two exceptions; one is where the *other party* repudiates the contract, or makes it impossible for himself to carry out his side; then the plaintiff need not complete, but may sue for the value of the part of the work which he has carried out. Thus in the case referred to the plaintiff had contracted to contribute a volume on “Costume and Ancient Armour” to a periodical publication called the “Juvenile Library,” and in consideration for this he was to receive £100. The early numbers were not commercially successful and the venture was abandoned. At this time the plaintiff had made a journey to inspect a collection of armour, had made some drawings, and had in fact completed a considerable portion of the work.

The defence was that the plaintiff could not recover for want of having tendered the complete work pursuant to the contract. This plea was overruled in the judgment, and it was made clear that in circumstances such as these the action was no longer based upon the contract at all; but the contract being no longer in existence, it was based upon a *quantum meruit*, and the author could recover payment for the amount of work he had completed, by way of damages for breach of contract.

The other exception arises where the circumstances are such as to raise an implied promise to pay for what has already been done; as by taking the benefit of the partly completed work, when the defendant had the option to refuse it. This promise would not therefore be implied in the case of an unfinished contract to repair a house.

¹ *Planché v. Colburn* [1831], 8 Bing. 14.

Obligation to Publish.

Legal battles have from time to time centred round the situation created by an author who has assigned his copyright in consideration of a payment by royalty or share of profits, and whose agreement did not impose a clear obligation on the purchaser to publish. Loosely worded agreements will always be the most fruitful of all sources of litigation, and the following unreported case,² the gist of which is given in Halsbury's "Laws of England," is an excellent example.

Here the plaintiff had assigned his copyright in certain songs to an amalgamated newspaper syndicate, in consideration of a certain royalty to be paid on every copy sold by the syndicate. The songs were published in an important Sunday paper with the knowledge and approval of the defendant syndicate, and the plaintiff sought to recover royalties in respect of the publication and sales of the song by the newspaper proprietors.

It was held that the assignment was unconditional, except as to payment of royalties on sales by the syndicate, who were themselves under no obligation to publish; and the plaintiff could not recover royalties on sales by *third parties* who were not themselves agents of the defendant company.

Obligation to make a Later Agreement with same Author.

It will be of particular interest to many to hear of a difficulty that arose years ago in connection with that well-known publication, "The Temple Shakespeare."³ The publishers had made an agreement with an author that he should edit the whole of the plays, writing introductions, etc., that they should pay royalties and that the copyright was to vest in themselves. A further clause read as follows: "In the event of a cheaper or any other form of edition being thought desirable by the publisher, it shall form the subject of agreement on similar *pro rata* terms to those embodied herein."

The publication was exceedingly successful, a quarter of a million copies being sold, and was in fact followed by a "large" "Temple Shakespeare" with illustrations, and royalties were paid to the editor on this also. Subsequently a school edition was discussed, and the editor alleged a verbal agreement as to the royalty to be paid him in respect of it. The publishers however employed another author to prepare the school edition and the first editor sued for an injunction to restrain publication. He gained the day but was awarded damages in place of an injunction.

¹ *Hole v. Bradbury* [1879], 12 Ch. D. 886.

² *Nicholls v. Amalgamated Press* [1907], October 28.

³ *Gollancz v. Dent* [1903], 88 L.T. 358.

Publishers' Sales at Retail Prices.

An interesting little point arose in a 1919 case where the agreement was that the publisher should account to the author for all sold copies of his book at the wholesale-trade price, less a commission of fifteen per cent, the author to pay the cost of printing and binding.¹

The book was published at 5s. net, 3s. 4d. wholesale, but in some cases the defendants received more than 3s. 4d. from retail purchasers in their bookselling department, and this excess they claimed to retain. They alleged in their defence that there was no wholesale-trade price, that it varied for different customers, and that there was a usage entitling them to retain the excess over 3s. 4d.

In the result it was held that the defendants were bound to account to the plaintiff for all sold copies at the prices *actually received* by them, less fifteen per cent.

Licence to Publish.

It is more usual of course for the publisher to bear all expenses of publication, and then failing any specific stipulation, he is entitled to fix the price of the book.² But it has also been decided that in such a contract the author is not precluded from contracting with another publisher in respect of a *second edition*, provided he has retained his copyright.³ Thus unless a special clause is inserted, a contract between an author and a publisher passes only a licence to publish, but not an assignment of copyright. This important principle was laid down in an action brought by Charles Reade, the author of "The Cloister and the Hearth," in a dispute about a second edition of "Peg Woffington."

It appears however that different considerations will arise if the author has accepted any liability in respect of the expenses. Thus it was said in an old case, that where a bookseller had undertaken to publish a work, and the profits were to be shared with the author after interest had been deducted in respect of money advanced by the bookseller, then in these circumstances the bookseller had a lien on the copyright for his disbursements.⁴ This would effectively prevent the author from entering into an agreement with anyone else for the publication of a second edition before the first publisher had recovered his expenses.

In another case where an author sold the copyright of a work called "Beeton's Christmas Annual," and in addition agreed to give his whole time to the plaintiff's service, it was held that the author could be restrained from advertising a rival work.⁵

¹ Kitson v. King [1919], 36 T.L.R. 162.

² Reade v. Bentley [1858], 3 K. & J. 656.

³ Warne v. Routledge [1874], L.R. 18 Eq. 497.

⁴ Brook v. Wentworth [1797], 3 Anst. 881.

⁵ Ward v. Beeton [1874], L.R. 19 Eq. 207, see p. 43 *post*.

Failure to Supply Manuscript.

Where an author has contracted to write a book, and fails to supply the necessary manuscript, he is liable to the publishers for the loss of the profit they would otherwise have made;¹ but the Courts will not order the specific performance of the broken contract.

The question however does not usually arise in as simple a form as this. In one dispute an author was to write serial stories for a certain period extending over a year, and was not to write for any other newspaper published at less than sixpence. The author sent in a number of instalments, and then brought the current story to an abrupt conclusion, and entered into an engagement with another publisher.

It was held at the trial that the contract was equivalent to a yearly engagement, and although it was fulfilled by weekly contributions, yet the author had no right to terminate it as if it were a weekly engagement.²

What is an Edition?

In some cases where rights and liabilities in respect of profits attach to one edition only, a great deal will turn on the judicial construction given to the word "edition." The term has been held to mean every quantity of the book put forth to the trade at one time; and as soon as the expenses of printing, binding, advertising, etc., are closed, that constitutes the completion of the edition, although the types and plates may not be broken up, and although a part of the copies taken may be retained and stored in the warehouse of the publisher.³

Agency.

The law of agency has at least one very special application in relation to authors. This arises through the employment of literary or press agents. An author will frequently make use of such a person to conduct the negotiations and arrange the terms of his contract with his publishers.

The agent's remuneration will often be by way of a commission on the sums paid by the publisher under the contract. Such a contract will usually be in the author's name, and the agent may also be named in the contract as a party to it, if his commission is specially referred to therein. It will as a rule be a part of the agent's duties to collect any royalties payable to the author from time to time.

Difficulties may arise at a later date, when the author may desire to put an end to the agency. The general law is that an agency

¹ *Gale v. Leckie* [1817], 2 Stark 107.

² *Stiff v. Cassell* [1856], 2 Jur. (N.S.) 348.

³ *Reade v. Bentley* [1858], 3 K. & J. 656.

may be determined in one or two ways. This may be by the act of the parties, *if* the principal is free to revoke the agent's authority, or if the agent renounces his agency. Or it may be by the operation of law, as when any agreed period of time has expired, or the agent's undertaking has been completely performed, or where either party dies.

These cases are comparatively simple; but it may easily happen that after many years the author feels that his agent has been amply remunerated for arranging an old contract. He may then decide to terminate the agent's authority to collect his royalties, and may give notice accordingly to the publishers.

In circumstances of this kind, any such attempt is foredoomed to failure and can always be successfully resisted by the literary agent.

The reason for this from the legal standpoint is that where any agency is "coupled with an interest," and does not come to an end in one of the ways explained above, then the authority is said to be irrevocable, and the agency cannot be terminated at all without a breach of contract.

CHAPTER IV.

CUSTODY OF MANUSCRIPT.

There are probably few persons who have not from time to time been troubled with goods of one kind or another sent to them by over-anxious traders without any kind of order or inquiry. Such a method of doing business may be resented, and the receiver may well feel that the tradesman has no right to put the burden upon him of repacking and returning the article. But if he does nothing, and retains it, does he incur no liability? Or if he follows his inclination and destroys it, can he not be held answerable?

The problems raised here are in the main simply a general application of the special difficulty which confronts editors who receive unsolicited manuscript. What is their liability in the event of loss?

The subject cannot be treated even in outline without some analysis of the possible sets of circumstances, and then with proper modifications such an analysis will apply to the whole law concerning the custody of other people's goods, or in legal terms the law of "Bailment."

The Kinds of Bailment.

It will be found in the main that any particular problem can be relegated to one of the four following classes:—

Involuntary Bailment.

Gratuitous Bailment.

Bailment for Reward.

Liability after return has been demanded.

As a rule an editor's difficulties with his contributors will belong to the first or second class; whilst claims against printers made *by* editors, authors or publishers are unlikely to come into the first, though they may well be in any of the other classes.

Involuntary Bailment.

Under this title we must consider the liability involved where goods are sent without any request by one person to another person who does not make it any part of his business to receive such goods.

For example, in an old case,¹ a man wishing to show a picture

¹ *Lethbridge v. Phillips* [1819], 2 Stark 544.

to a possible customer, sent it to his house without any previous communication. Whilst lying there the picture was accidentally injured. It was held on these facts that the defendant was under no responsibility for keeping the picture safely.

In such a case clearly the defendant could claim immunity because he had not only not asked for the picture, but further in no sense could he be said to "hold himself out" as a person who received pictures.

In the next case we come a little closer to the dividing line. Here an author had been asked by the lessee of a theatre to send him a sketch or synopsis of a certain play.¹ Instead of doing this the author sent the *whole* manuscript, which the defendant (the lessee) lost. It was held that no duty of any kind was cast on the defendant by sending him something he had not asked for.

This is clearly the very furthest limit to which the principle can be extended, and we may now compare a set of very similar facts in which the defendant was not held free of responsibility.

Gratuitous Bailment.

The two cases last quoted were considered in an action which was tried at a London County Court in 1926.²

An author had forwarded the manuscript of two plays to Mr. Bromley Challenor who was then taking a leading part in "Are you a Mason?" which was being performed at the Kingsway Theatre.

Mr. Bromley Challenor acknowledged receipt of the plays, and stated he would read them, but he would like to know what the author's intentions were. Did the author want to put the plays on, himself, or did he want Mr. Bromley Challenor to put them on? And added: "However, will you let me know, and in the meantime I will read the scripts?"

The plays were lost and the author commenced an action for delivery or damages. On behalf of the defendant, Mr. Bromley Challenor, it was contended that there was a trade custom that editors of newspapers were not liable for the return or safe custody of manuscripts sent to them and rejected.

The plaintiff's reply was that Mr. Bromley Challenor's letter was an admission that the "goods" had been received from the owner, and that he was interested in these plays.

His Honour Judge Scully in the course of his judgment said that the letter constituted a promise to read the plays in consideration of having received them and of the prospect of producing them. Hence the defendant was under a duty to take care of the manuscripts, and in the present circumstances was under an obligation to explain how the documents were lost.

¹ Howard v. Harris [1884], 1 Cab. & E. 253.

² Summers v. Challenor [1926], June 26, *Law Journal*.

It will be seen from this that the case was really regarded as a bailment for reward, the "reward" being the prospective advantage of production. This put the defendant under a greater duty than if he had been a gratuitous bailee, while, as we have seen, if he had been a mere involuntary bailee he would have been under no duty at all.

But since any producer of plays and most editors do unquestionably hold themselves out as being ready and willing to receive and read authors' manuscripts of a suitable character, they will rarely be able to claim the complete immunity from any duty of involuntary bailees; (and even this status, it is perhaps unnecessary to add, would be no answer to a claim for "conversion" which would certainly follow if a person destroyed the goods or converted them to his own use).

Printer as Gratuitous Bailee and as Bailee for Reward.

When any customer leaves goods with a printer, and does not agree to give him anything for looking after the goods, then the printer is a gratuitous bailee. But the consideration which on principle would convert the printer from a gratuitous bailee to a bailee for reward need not be a money consideration at all. Most frequently it only consists of some indirect advantage, such as being allowed to continue to keep the customer's account, or perhaps merely the prospect of future work.

As a rule however it appears to have been held that when a customer hands to a printer MSS., blocks, stereos or other articles, and does not at the same time place any order with the printer, then the latter is in the position of a gratuitous bailee, in spite of his indirect advantage.¹

If an order is now given to the printer, entailing the use of these articles, then until the order is completed the printer is in the position of a bailee for reward. And if again the customer asks the printer to retain the blocks, etc., he becomes once more a gratuitous bailee.

Completed Work.

Similarly in reference to the completed work, if the customer does not take delivery, but requests the printer to retain custody without agreeing to pay any sum for storage, then the printer is a gratuitous bailee in respect of the goods.

As soon as the goods are delivered to the customer they are at his risk of course, and questions will rarely arise on the general issue. But if the customer fails to take delivery the position is more difficult.

In these cases both the property in the goods and the risk will pass from the printer to the customer when the job has been com-

¹ Bullen v. Swan Electric Engraving Coy. [1907], 23 T.L.R. 258 C.A.

pleted and the customer has been notified and given a reasonable opportunity of inspecting the completed job.¹

Unbound Work.

Special difficulties arise again when a customer places an order with a printer for the printing of a specified number of sheets which are only to be bound up as and when required.

If there are really two contracts, one for printing and the other for binding, then as soon as the printing is done and the customer has been given an opportunity of inspecting the property the risk in the sheets passes to the customer.

But if, as is perhaps more usual, the contract to print and bind is one entire contract, then as each instalment of books is bound, and the customer notified that he may examine them, the risk and the ownership in the books pass to the customer; but the risk in the printed but *unbound* sheets remains in the printer.

In this connection a distinction may well be drawn between cases where the printer supplies the paper in the ordinary way, and special cases where the customer has supplied the paper.

In the first case, if the customer has not delayed his instructions and the printer has accepted the order, then in the event of loss the printer is under an absolute liability to replace, until such time as the risk passes as above.

If on the other hand the customer has supplied the paper, then in respect of this part of the risk (i.e. the value of the paper before printing) the printer is only in the position of a bailee for reward, and can claim immunity in certain circumstances which will be examined later.

Extent of Liability of Gratuitous Bailees.

Having considered what will in particular circumstances constitute a gratuitous bailee and a bailee for reward, it becomes necessary to define the liability which each incurs.

The principle in regard to a gratuitous bailee is that he is under a duty to exercise such care in looking after the goods as he would exercise in looking after his own goods.² If the goods are lost or damaged in these circumstances and he can prove that the damage or loss was not due to his own act or default this is a sufficient answer. For example, if manuscript is accidentally destroyed by fire the bailee will not be liable if he can show that the goods were kept in a proper place, and in the charge of proper persons.

It is sometimes said that a gratuitous bailee is only liable for "gross negligence," but this is an inexact and unsatisfactory expres-

¹ Sale of Goods Act [1893], Sec. 18 (R. 2).

² *Shiells v. Blackburne* [1789], 2 R.R. 750.

sion, being indeed, as has been pointed out from the Bench, only "ordinary negligence with the addition of a vituperative epithet."¹

Editors as Gratuitous Bailees.

In regard to editors the trade custom quoted in a previous case will be remembered.² In addition the following statement appears in Halsbury's "Laws of England": "In the case of manuscript³ which is submitted voluntarily to an editor in the hope of its being accepted, the editor is not, in the absence of circumstances showing an acceptance of the manuscript for publication, responsible for its safe custody, and if the manuscript is lost the author cannot recover its value." In other words an editor can claim the immunity of an involuntary bailee.

This view might quite conceivably be supported on *conclusive evidence* of reasonable custom, but the attempt to extend the alleged custom in the playwright's case failed completely; and in the special circumstances he was held to be not only a gratuitous bailee, but a bailee for reward.

Even as to editors the present writers are by no means satisfied that the above passage constitutes a complete or sufficient definition of their position on the principles of the law of bailment. The authorities quoted in support of the passage are anything but conclusive and the supposed custom does not seem to have been judicially established as yet. Finally the oft-repeated caution: "The editor will not be responsible, etc."—would seem to be totally unnecessary, if even without it the editor is under no liability whatever. Apart from special warnings of this kind, it would appear that the better view is that the law regards editors as gratuitous bailees.

At the risk of repetition let it be said, that after a loss a gratuitous bailee must show that he had used as much care as a reasonable person would use in protecting his own chattels. This is all he need prove, but evidence must be given of these reasonable precautions.⁴

The defendant need not explain or account for the loss any further; the burden now falls upon the plaintiff to give affirmative evidence of negligence before he can make the gratuitous bailee liable.⁵

Example of Gratuitous Bailment.

Curiously enough a printing case is one of the most universally accepted recent authorities on the general law.⁶

¹ *Wilson v. Brett* [1843], 11 M. & W. 113.

² *Summers v. Challenor* [1926], June 26, *Law Journal*, and see p. 22.

³ Vol. xxiii, p. 217.

⁴ *Coldman v. Hill* [1919], 1 K.B. 443.

⁵ *Powell v. Graves* [1886], 2 T.L.R. 663.

⁶ *Bullen v. Swan Electric Engraving Coy.* [1907], 23 T.L.R. 258 C.A.

A firm of publishers had left a quantity of very valuable engraved plates with the printers after the execution of an order. In accordance with the usual practice these were then stored free of charge, and at some later date the printers alleged that without any negligence on their part the plates had been stolen by some person unknown, and they had been unable to trace them.

The storage was for the convenience of both parties; of the plaintiffs because it cost them nothing, and of the defendants because it increased the likelihood of their getting "repeat orders." The decision that upon these facts the printers were gratuitous bailees and not bailees for reward is of no small importance.

It was then contended at the Bar that a gratuitous bailee must show not only that the loss had occurred through no want of reasonable care on his part, but further that the loss happened in some way which he could account for, and that in relation to *that particular matter* proper care had been taken. This latter proposition was dismissed as absurd.

Liability of Bailee for Reward.

When a bailee receives valuable consideration for looking after the goods he is in the position of a bailee for reward and is under a duty to exercise a higher standard of care than a gratuitous bailee. If for example he is a printer he will have to show that he exercised all the care and skill that could reasonably be expected from a skilled printer's warehouseman.

It is no longer enough to say that the bailee treated the goods with the same care as if they had been his own. He is now being paid for his services as "a skilled storekeeper, acquainted with the risks to be apprehended from the character or locality of the storehouse itself. He is under a duty not only to take all reasonable precautions to obviate those risks, but also to take all proper measures for the protection of the goods when such risks had actually occurred."¹

There is however a limit to the liability of a bailee for reward. Provided he can show that he has exercised all the care that is required, the law does not make him an "insurer" of the chattels confided to him. But (and this is the distinction from the gratuitous bailee) the bailee for reward must show further *how the loss occurred* and why he should be excused.

He may quite properly put up a defence of inevitable accident, such as fire, and apart from special contract he is under no absolute duty to insure against fire. If however he has actually insured, and recovers the insurance money, he will be in the position of a trustee of the money for the owner of the chattel, and is bound to account to him for whatever sum he recovers.²

¹ *Brabant v. King* [1895], A.C. 632.

² *Waters v. Monarch Life Assurance Co.* [1856], 5 El. & Bl. 870.

Liability for Acts of Servants.

Again while a bailee for reward is responsible for the fraud or negligence of his servants or agents, this is only where the act was committed within the apparent scope of their authority, or in the course of their employment.

Thus where a coachbuilder whilst repairing the defendant's carriage lent him another one to use, and then the defendant's coachman took the carriage out for his own purposes and it was damaged, it was held that the defendant was not responsible.¹

Editors as Bailees for Reward.

In respect to editors reference may again be made to Halsbury's "Laws of England."² "In the case of manuscript which is submitted to an editor in response to an express invitation, or of articles ordered to be written and sent to him for approval, the standard of care required of the editor is that which a prudent man would take of similar property of his own, and if he proves that such care has been taken the burden of proof has been discharged and *he is not bound* to account for the cause of his loss."

This it will be seen would merely constitute the editor in these circumstances a gratuitous bailee. The learned author does not suggest that the view is supported by recognized custom, and apart from this it seems impossible to reconcile it with the general law. For example, it conflicts clearly with the principles enunciated in the case where a manuscript had been lost whilst in the custody of Mr. Bromley Challenor,³ and in the view of the present writers an editor who invites the submission of manuscript is under the greater liability of a bailee for reward.

Example of Bailment for Reward.

A recent case in the King's Bench Division will now be considered, and contrasted with the one in which a printer was exonerated in respect of the loss of a set of plates.⁴

Here a tailor made up seventy marten skins, worth £600, belonging to his customer, into a fur coat. He then wrote that the coat was ready, but the plaintiff being in Scotland and unable to come to London "owing to the strike" she left the coat in the defendant's care.

The defendant kept the coat in a safe, and every morning it was taken out and brushed and shaken and hung in a showcase ready for the plaintiff when she called. Whilst there it was stolen by expert thieves.⁵

¹ Sanderson v. Collins [1904], 1 K.B. 628.

² Vol. xxiii, p. 217.

³ Summers v. Challenor [1926], June 26, *Law Journal*, and see p. 22 *ante*.

⁴ Bullen v. Swan Electric Engraving Co. [1907], 23 T.L.R. 258 C.A.

⁵ Mitchell v. Davis [1920], 37 T.L.R. 68.

In this case counsel on both sides seemed to agree that the tailor was a gratuitous bailee, but differed on the point of whether he had shown a proper amount of care. The learned Judge took a different view. He said that the tailor's duties as a bailee for reward did not cease as soon as the work was done. Those duties continued until the parties had clearly shown that they intended to alter the original relationship between them. Here the defendant might have said "I shall charge you storage," and the plaintiff might have said "Will you keep the coat free?" Anything of this kind would have changed the contract between the parties.

But when the defendant merely said "Your coat is ready; where shall I send it?" and the plaintiff said "I will come for it," there was no change in the relationship. The defendant was guilty of negligence which made him answerable as a bailee for reward, and judgment was given accordingly.

Liability Limited by Special Contract.

Everything that has been said in the matter of the liability incurred by a bailee is subject to the terms of any particular contract, and it is always preferable to define the risks undertaken and those excluded, in this way.

In this connection two points in particular may be mentioned. One is that if the bailee purports to limit his liability by any special notice, he must take reasonable steps to bring that notice to the attention of the customer. Important clauses, in print so small as to be nearly illegible, have not infrequently been held not to be binding.

The other matter is that any limitation of liability must be made at the time when the contract is entered into. Any *subsequent* attempt to limit, or even a subsequent *agreement* to limit liability would be void for one fundamental reason. The customer would be receiving no "consideration" or return for the benefit that he is abandoning in agreeing to relieve the bailee of his liability, whereas the law requires consideration as an essential element of every contract.

Absolute Liability.

Where a person has custody of another person's goods certain circumstances may arise when in the case of loss or damage no excuse will avail him, and he is under an absolute liability to make good such damage or loss.

If for example an editor withholds manuscript from an author after he has demanded its return, or if the editor has improperly used it for his own purposes, then he is under an absolute liability to make good the value of the manuscript, and also to pay damages for the detention.

Again if a printer retains manuscripts, blocks, or plates after

their return has been demanded by the customer he also is absolutely liable for replacement in the event of loss. In certain cases a printer may be working upon paper supplied by the customer, and this as we have seen makes him a bailee for reward, and liable for any negligence, but not for inevitable accident. But if the printer *breaks his contract* and does not deliver the paper duly printed within the contract time, then he will be under an absolute liability in respect of such paper.

Breach of Contract.

The far-reaching consequences in the matter of liability which follow upon a breach of contract are well exemplified in the following case.¹

A publisher had entrusted books to a bookbinder to be bound under a contract to deliver within a reasonable time when required. The publisher later requested the bookbinder to deliver the whole of the books when bound, but he failed to deliver them "within a reasonable time." The books were subsequently burned in an accidental fire on the bookbinder's premises.

In resisting the publisher's claim for his loss it was contended amongst other points that the defendants were protected by a notice upon their invoices and letter paper that they would not be answerable for loss or damage by fire; and in any event that they were absolved from liability by an old statute² whereby "no action shall be maintained against any person in whose house or building any fire shall accidentally begin, nor shall any recompense be made for any damage suffered thereby, any law, usage, or custom to the contrary notwithstanding."

On each argument it was held that the fact that there was an antecedent breach of contract was sufficient to deprive the defendant of any protection he might otherwise have claimed.

Whatever the conclusions of law drawn in various cases quoted, there can only be one conclusion for the prudent business man; namely that he ought to insure his own goods with a reputable assurance company against all possible risks, and that he ought further to take out a floating policy to cover his customers' goods.

¹ *Shaw v. Symmons* [1917], 1 K.B. 799.

² Fires Prevention (Metropolis) Act, 1774.

CHAPTER V.

EDITORS AND REPORTERS.

Employment of Editors.

Difficulties have at times arisen from the fact that where a man has capably performed an editor's duties for a considerable time, his power and influence have become completely disproportionate to his legal position, as the servant of the proprietor. The law recognizes nothing special, however, in an editor's authority and position; and the most that can be said is that undue interference with an editor in the performance of his duties may amount to a breach of contract.¹

The case in which this was said dates back as far as 1860, when the editor of a periodical known as the *Photographic News* sued for an injunction against the proprietors, to restrain them from interfering with him in his editorial capacity, and from omitting his name from the title of the publication.

The bone of contention between the parties was (according to the editor's case) that the proprietors had required him to insert in the journal notices or articles about photographic instruments, and works connected with photography, which were not fair criticisms, but were in fact puffing advertisements, and the plaintiff had refused to write them. Following this, the proprietors, who were not in the position to terminate the employment except in the case of a clear breach of duty, took the alternative course of largely reducing the editor's control, and of omitting his name from the publication.

On the question of control the Master of the Rolls said in his judgment: "It appears to me that it would lead to a great amount of difficulty if the owners of a copyright in a journal were bound to insert everything which the editor thought fit. Everyone would admit that they would not be bound to insert any libellous matter. How is the court to draw the line and determine how far the owners of the copyright may interfere with the discretion of the editor?"

And he sums up the possible remedies thus: "If the defendants unduly interfere with the functions of the editor, or if he improperly introduces matter which is injurious to the journal, the best course is to have it settled by an action at law, and leave it to a jury to determine the amount of the damages"—but no injunction will be

¹ *Crookes v. Petter* [1860], 3 L.T. 225.

given. And similarly in the matter of excluding the editor's name as a part of the title or elsewhere, it was held that the claim could not be supported in the absence of any express agreement.

An Agent of the Proprietor.

From the last case it will be clear that of itself an editor's position confers no particular authority, and that everything depends upon the terms of employment in each individual case. Generally speaking, whether the editor is making a contract with contributors, or whether he is selecting matter offered for publication, he is deemed to be acting as the agent of the proprietor, and not as a principal.

The proprietor can thus be made answerable for any wrongful acts on the part of the editor if it can be said that such acts arise out of the terms of his authority, or are within the scope of his employment.¹ Conversely the editor can claim the agent's right of indemnification in respect of losses arising out of the service which he renders to his principal.

But on this point a clear distinction must be made in respect of illegal acts. Here the editor is just as responsible as the proprietors, and if he is proceeded against, either alone, or together with his principals, he cannot claim from them either contribution or indemnity. The law is, that there is no right of contribution between joint wrongdoers.² Similarly the innocent proprietor cannot recover damages from his own editor for inserting illegal matter without his knowledge.³

In the section devoted to "Defamation" it will be seen that agreements to indemnify a person who undertakes to publish libellous matter are against public policy, and unenforceable; thus, where a printer obtained this "security" from an editor, he found to his cost that he was acting at his own peril, in undertaking to do a wrong thing.⁴

Proprietor's Right to Defend Editor.

While it is abundantly clear that the editor can have no legal right to demand protection in respect of the consequences of a libel there is no doubt that if, as a matter of ordinary business, the proprietor likes to undertake the defence, there is nothing to prevent him from so doing.

The point arose in an interesting way some time ago in connection with the Royal British Nurses Association, and a newspaper known as the *Nurses Journal*. Here a certain doctor who was

¹ *Lloyd v. Grace Smith & Co.* [1912], A.C. 716.

² *Merryweather v. Nixan* [1799], 8 T.R. 186.

³ *Sharpe v. Feeney* [1898], 14 T.L.R. 185.

⁴ *Smith v. Clinton* [1909], 99 L.T. 840.

president of the association brought an action to recover damages for an alleged libel, published in a report of a meeting of the association at St. Bartholomew's Hospital, and chose to sue only the lady who was honorary editor, and not the association which was generally responsible.¹

The executive committee passed a resolution authorizing their solicitors to defend the action on behalf of the lady editor, and this was approved by a large majority of the general council. One dissentient member however brought an action to restrain the association from so expending its funds, on the general grounds that it could not be within the powers of a society incorporated for purposes connected with nursing voluntarily to undertake the defence of an action for libel.

Lord Justice Chitty decided with great respect that this contention, which was put forward on behalf of the dissentient member by Mr. Swinfen Eady (as he then was), was an absurd proposition, and that as a matter of ordinary business the funds of the association could be lawfully employed in thus defending its own agent.

Restraint of Trade.

It is an old principle of the Common Law that any agreement which a person makes, and which restrains him in the exercise of his particular trade or calling, is contrary to public policy, and is therefore void. Thus not infrequently where it is a condition in an agreement of service, that the servant shall not on completion of his term of employment set up in the same business on his own account in the same town, the Courts refuse to enforce the condition.

This doctrine which has been enormously modified in recent years is the outcome of a conflict of two principles—the freedom of contract and the freedom of trade.

The modern view is that such covenants *should* be enforced provided the person in whose favour they are made does not reserve more than a reasonable protection for his own interest.²

Thus where a publisher agreed not to publish in future a magazine of a particular description, and then at a later date broke his agreement, it was pleaded on his behalf that the covenant was void for "restraint of trade"; but when the point came to be decided it was held that such an undertaking was very similar to an agreement by a tradesman not to sell particular wares, and that it was by no means void on the grounds claimed.³

The application of the principle in contracts of service entered into by persons under employment is exemplified by the following

¹ *Breay v. Royal British Nurses Association* [1897], 2 Ch. 272.

² *Maxim Nordenfelt Co. v. Nordenfelt* [1893], 1 Ch. 630; [1894], A.C. 535.

³ *Ainsworth v. Bentley* [1866], 14 W.R. 630.

recently reported cases. In the first, an employee of a Co-operative Society of farmers' merchants had undertaken that whenever he left his present master, he would not enter any concern of the same nature within twenty-five miles, for a period of ten years, and further that he would not solicit any of the customers of the said business. The covenant was held to be unnecessarily wide, especially the latter part, because it applied to persons who might become customers after the defendant's service with the society was determined. The whole agreement was said to be bad in consequence, the Judge refusing to uphold part and condemn part.¹

In another case the defendant was employed in a hairdressing business in Southsea, and remained in the same service for seven years, learning all the branches of the business, and becoming personally known to the customers. Her contract contained a clause prohibiting her during a period of two years from the termination of her service from being engaged in any similar business within the county borough. She left the plaintiff, and became an assistant to a competitor 100 yards away. It was held that the covenant was not unduly wide and an injunction was granted.²

Notice of Termination of Employment.

In all agreements which do not provide for notice of any particular length of time to be given, upon the termination of the service by either side, the door is left open for very considerable dispute. Everything depends upon reasonable custom, and evidence must be brought to prove the custom as it exists at the present day. It must not be forgotten, however, that any servant who is guilty of flagrant misconduct is liable to instant dismissal, unless his contract protects him for a fixed term of years; and in the case of an editor who entered into another contract inconsistent with his present agreement, this was held to be conduct such as to justify summary treatment of this kind.³

The customary notice in the case of important newspapers was said by Lord Justice Swinfen Eady, in a 1916 case heard before the Court of Appeal,⁴ to have been proved as twelve months in the case of editors and six months in the case of sub-editors.

Some of the facts in that case are sufficiently amusing to merit a digression. The London editor of an important New York newspaper had been working for some seventeen years in that capacity, when another gentleman was sent over by the proprietors in order, as the plaintiff said, "to freeze him out of his position."

¹ East Essex Farmers Ltd. v. Holder [1926], W.N. 230.

² Beck v. Cluett [1926], June 26, *Law Journal*.

³ Devenish v. Waters [1892], January 27, *Times* newspaper.

⁴ Grundy v. Sun Printing Association [1916], 33 T.L.R. 77

The defendant's story was that the object of the change was to make the news more acceptable to the American public. It was in evidence that the new editor said to the old editor: "I have got the angle from which the American public want to look at these things; you have not got the angle, therefore your contributions are useless."

"What the American angle was," said the Lord Justice, 'appeared from the fact that he sent to America three articles, two of which were scurrilous productions, not by post in the ordinary way, but by hand so that they might escape the Censor.'

And now, who shall say that "Martin Chuzzlewit" is over-coloured? "Here's this morning's New York Sewer!" cries one newsboy, as Martin lands, "Here's this morning's New York Stabber! Here's the New York Family Spy! Here's all the New York papers! The last Alabama gouging case, and the interesting Arkansas duel with Bowie knives. Here they are! Here's the papers!"

Film Editors.

Although the periods of six and twelve months are now recognized as the customary notice to which sub-editors and editors are entitled apart from express stipulation, this applies only to newspapers, and even then possibly not to small publications. Soon after the end of the war a case was heard before the late Mr. Justice Bailhache in which Pathé Frères, Ltd., were sued by a former editor of *Pathé's Animated Gazette*, the well-known film publication of current events, which was said to reach the most remote places, where people hardly ever read the newspapers.¹

The plaintiff in this case received one month's notice, and brought an action claiming that as editor he was entitled to six months according to the custom of journalism. The learned Judge held that although his duties might be strictly analogous to those performed by a newspaper editor, still a film was not a newspaper and the customary notice for newspapers did not apply.

Officers of Limited Companies.

Under the Rules of the Supreme Court if a party to a cause is a joint-stock company, any opposite party may apply for an order allowing him to deliver interrogatories (or lists of questions which must be answered on oath, so that the other side may obtain necessary admissions), to "any member or officer of such company." On this point it has been decided that neither the editor nor the chief reporter of a newspaper owned by a limited company is a "member or officer of the company" within the meaning of the rule.²

¹ McCabe v. Pathé Frères [1919], 35 T.L.R. 313.

² Murray v. Northern Whig Ltd. [1912], 46 I.L.T. 77.

Privileges of the Press.

Reporters have certain statutory rights as representatives of the press which it is convenient to deal with at this point. Curiously enough both the Acts which together form their "Charter of Liberties" were placed on the Statute Book in 1908.

The Local Authorities (Admission of the Press to Meetings) Act, 1908, provides in Section 1 that Representatives of the Press shall be admitted to the meetings of every local authority; provided that they may be temporarily excluded if a majority of the meeting resolves that in view of the special nature of the business then being dealt with such exclusion is desirable.

The expression "local authority" means in addition to County Councils, Borough, Urban and Rural Councils, Parish Meetings, Boards of Guardians, Water Boards and any other local body which may have the power to make a rate.

The expression "representatives of the press" means duly accredited representatives of newspapers and news-agencies.

This statutory privilege does not extend to *committees* of local authorities, although such committees are at liberty to admit reporters.

The Children Act 1908 provides in Section 114 that the Court may be cleared when a child or young person is called as a witness in relation to offences against decency and morality. Notwithstanding this however, the section specifically reserves the right of bonâ-fide newspaper representatives to remain in court.

This reservation was bound to lead to certain difficulties, since if a judge wished to reduce publicity in an unsavoury case, and cleared the Court for this purpose, his object was likely to be frustrated by the remaining in Court of the press representatives. Such a difficulty in fact arose and was fought out in the highest tribunal, in the case of *Scott v. Scott* in 1913.¹

The whole question of what justified an order for a hearing *in camera* was considered in the course of that litigation, and it was finally decided that in any case such an order extends *only to the hearing*, and does not prohibit the subsequent publication of what passed, provided that such publication be made in good faith and without malice.

Judicial Proceedings Act.

This measure, which became law in December 1926, can hardly fail to revolutionize a certain part of the newspaper world. A short résumé of the Judicial Proceedings (Regulation of Reports) Act is as follows:—

It shall not be lawful to print or publish (or cause or procure such printing, &c.):—

(a) In relation to *any* judicial proceedings, any indecent matter

¹ *Scott v. Scott* [1913], A.C. 417.

or details, the publication of which would be calculated to injure public morals.

(b) In relation to judicial proceedings *for dissolution or nullity of marriage*, judicial separations &c., any particulars other than the following:—

- (i) The names, addresses and descriptions of the parties and witnesses.
- (ii) A concise statement of the charges and countercharges.
- (iii) Any submissions and decisions on points of law.
- (iv) The summing up, findings and judgment.

The maximum penalty provided is four months' imprisonment, with or without the addition of a fine of not more than £500.

It was felt in Committee that reporters might very well find their position intolerable under these drastic regulations; and it was therefore provided that no person other than a proprietor, editor, master-printer or publisher should be liable to be convicted under the Act.

A further assurance against irresponsible attack exists in the provision that no prosecution is to be initiated without the sanction of the Attorney-General.

It is interesting to notice that the scope of the measure is not limited to newspapers and magazines, and therefore the prohibited "publication" may conceivably be extended to correspondence, and certainly to foreign editions of English papers. Accounts of foreign trials also come within the Act. But law reports and medical works are specifically excluded.

At a very late stage a suggestion was made that a clause should be added with a view to putting a stop to the publication of articles containing the experiences of convicted criminals. There can be no two opinions as to the eminent desirability of doing away with this most objectionable form of sensational journalism. Owing however to the fact that the object of the Bill was defined as "the regulation of press reports of judicial proceedings," it was decided that this much-needed reform could not be incorporated into it.

Right to Nom de Plume.

In certain cases where a journalist has for years contributed to a newspaper under a certain name so that such contributions have become a "feature," a serious question may arise upon the termination of his employment.

It was decided in a 1908 case¹ that in these circumstances the journalist has a right, as against the proprietor, to continue to use the name for his own purposes.

¹ *Lanada v. Greenberg* [1908] 24 T.L.R. 441.

CHAPTER VI.

FORMAL REQUIREMENTS AND TITLES.

It is proposed in this chapter to deal with certain requirements that printers and newspaper proprietors are under an obligation to fulfil. These are briefly the obligation to register certain publications, the obligation to keep copies for a fixed period, the obligation to supply copies to the British Museum, and the obligation to affix an "imprint."

Registration under the Libel Act.

This duty which was imposed upon newspaper proprietors by the Newspaper Libel and Registration Act 1881 was in the nature of a *quid pro quo* for the special privileges which were then for the first time given to newspapers.

The most important of these privileges was that of protection against libel actions in respect of reports of public meetings if published without malice. In addition, no *criminal* prosecution for libel was to be commenced against any proprietor, publisher or editor of a newspaper without the written fiat of the Director of Public Prosecutions, or Attorney-General.

The registration required by the Act enables a person wishing to take *civil* proceedings in respect of any statement published, to discover immediately whom he should sue. Registration is not required on the part of a newspaper belonging to a joint-stock company.

The publications which must be registered under this Act are defined as papers "containing public news, intelligence, or occurrences; or any remarks or observations thereon," if printed at intervals not exceeding twenty-six days.

A yearly registration must be made in the form provided, in the month of July, and in the event of failure to register after a further month's grace each printer and publisher of the newspaper is liable to a penalty not exceeding £25. He may also be directed by a summary order to make the return within a fixed time. Wilful misrepresentations or omissions in the return may be punished with a fine of £100.

Any person may inspect the register of newspaper proprietors, and certified copies of entries may be obtained upon payment of a

fee. The address of the Registrar of Newspaper Returns is Somerset House, W.C. 2. The particulars required are the title of the newspaper, the names and occupations of the proprietors, and their place of business and residence. Changes in proprietorship may be returned to the registry office at any time on the appropriate form.

Registration for Postal Purposes.

Special postal rates are allowed in case of newspapers registered for the purpose at the G.P.O. London, under the provisions of the Post Office Act 1908.

For this purpose the publication must consist wholly or in great part of political or other news, articles relating thereto, or to other current topics, with or without advertisements. The newspaper must be printed and published in the British Islands at intervals of not more than seven days and must bear the title and date of publication at the top of each page.

Formerly it was a condition that the sheets should not be stitched together, but this is no longer insisted upon.

Stationers' Hall Registry.

The Stationers' Company have recently established at Stationers' Hall, E.C.4, a voluntary register for books and fine art publications. This register is not kept pursuant to any statute, and the entries are simply for the purposes of record, and to provide evidence of the existence of the work on a given date in the event of an alleged infringement of copyright.

A wide range of publications will be accepted, and the words "Registered at Stationers' Hall" may be added to any registered work. It should perhaps be added that this new Register is not in any sense a continuation of the old register of copyright works, but is entirely separate and distinct.

Copies for British Museum.

The Copyright Act 1911 requires the publisher of every book, on pain of a fine of £5 and the value of the book, to deliver a complete copy to the British Museum within one month after publication. The copy is to be finished in the best manner in which the book is published, and to be printed on the best paper.¹

Upon receiving a written demand from the authorities having the control of certain libraries, the publisher is again bound to supply a copy, and in this case the copy shall be on the paper of which the largest quantity is printed. The libraries having this power are the Bodleian at Oxford, the University Library at

¹ Sec. 15, p. 122 *post*.

Cambridge, the Library of the Faculty of Advocates at Edinburgh, and that of Trinity College, Dublin, and also the National Library of Wales.

The term "book" includes maps, pamphlets, sheets of music, and newspapers,¹ but not second or subsequent editions without alteration. By a regulation made under the Copyright (Amendment) Act 1915 a large number of trade publications are exempted, unless as to any particular publication delivery is demanded by the Trustees of British Museum.

Preserving Copies.

Every printer is required (by the Newspapers, Printers and Reading Rooms Repeal Act 1869) to keep for six months a copy of every paper he prints, and to write on it the name and address of the person who employed him. Within this period the printer is bound to produce the copy to any Justice of the Peace who requires to see it, and the penalty for failing to do so is £20. No proceedings are to be taken to recover penalties under the Act except in the name of the Law Officers of the Crown, and the prosecution must be commenced within three months after the penalty was incurred. It is interesting to notice that this is merely a re-enactment of a section of the Unlawful Societies Act 1798.

Imprint.

The last of these formal requirements which must be considered was also imposed by the Newspapers, Printers and Reading Rooms Repeal Act. This is that every person printing any paper or book for publication is to print his name and his address on the first or last leaf. The penalty for failing to comply, in respect of each copy so printed, is a fine of not more than £5.

This obligation does not extend to certain specified publications, viz. :—

Bank notes, bills of exchange or any other security for payment of money.

Bills of lading, policies of insurance, letters of attorney, deeds and agreements.

Transfers, assignments and dividend warrants for stock.

Receipts for money or goods.

Court proceedings and papers printed for public authorities.

Parliamentary papers.

Impressions of engravings.

There is also a general exemption in respect of the printing by letterpress "of the name, or the name and address, or business or profession, of any person, and the articles in which he deals"; also in respect of any papers for the sale of estates or goods, by auction or otherwise.

¹ *Walter v. Howe* [1881], 17 Ch. D. 708.

Therefore business and address cards, price lists and ordinary commercial catalogues need bear no imprint; and even apart from these statutory exceptions it will be within most people's observation that other printing work of a trivial kind, such as menus and concert programmes, is very frequently produced without imprint. In these cases, although there is undoubtedly the risk of a prosecution, yet the provision that informations may only be laid *by* the Law Officers of the Crown is a protection against vexatious proceedings.¹

Every person publishing or dispersing matter printed in contravention of the statute is equally liable to the penalty.²

It need perhaps hardly be added that the special value to the community of the Act is in relation to illegal publications of various kinds, since it effectively prevents the indiscriminate broadcasting of such matter emanating from an anonymous source.

A case reported more than a hundred years ago, and decided under the old Unlawful Societies Act, is authority for saying that a printer cannot recover for his labour and materials unless he has affixed his name to the work.³

Election Posters.

A special liability was imposed upon printers and publishers to a fine of £100 in respect of election bills, placards and posters which fail to bear the name and address of the printer *and* publisher by the Corrupt and Illegal Practices Act 1883. Any person posting such bills or placards is similarly liable.

Letters, circulars and pamphlets are not included under this Act. If the guilty person is the candidate himself or his election agent the offence is declared to constitute an "illegal practice" in his case, making him liable to a £100 fine, and incapable of being registered as an elector for five years.

Subsequent statutes have extended the application of these provisions to Municipal Elections, Elections for Local Boards, Poor Law Guardians, School Boards, and Elections of County Councils.

Although in the case of most of the offences under this Act there are considerable powers of relief where the transgression did not arise from any want of good faith on the part of the candidate or his agent, the Court has no power to grant relief to a printer who fails to print his name upon the specified publications.⁴

It is also an offence under the Act knowingly to publish a false statement of the withdrawal of a candidate at an election, for the purpose of procuring the election of another candidate.

¹ *Key v. Bastin* [1925], 1 K.B. 650.

² *A-G. v. Beauchamp* [1920], 1 K.B. 650.

³ *Bensley v. Bignold* [1822], 5 B. & Ald. 335.

⁴ *Ex parte Lenanton* [1889], 53 J.P. 263.

Trade Printers—Liability as to Imprint.

A special difficulty arises from time to time where a printer receives an order which for one reason or another he is unable to execute, and which he then proceeds to sub-contract to a "Trade Printer." Whose imprint should be affixed, and has the trade printer any answer if he is summoned for failing to show his own name upon the work?

In these cases it is usually pleaded that there is a long-standing and admitted custom to affix the imprint of the principal contractor, and *not* that of the sub-contractor who has actually done the work; and it is obvious that any other practice would often give rise to an awkward position between the principal contractor and his outside customer.

A further defence based upon the relation of principal and agent can be set up where the principal contractor owns plant which is fully capable of carrying out the job, and the sub-contractor or trade printer is merely assisting him. Such a defence would of course fail in the case of specialized work which was "given out" because the principal contractor did not possess the requisite type or machinery.

On the same lines it has been held, that whenever the principal contractor is only a commercial agent, with no printing establishment of his own, the imprint *must* be that of the actual printer, and his alone. This important point was discussed in the "Federation Circular" of the printing trade issued by the Federation of Master Printers and Allied Trades in June 1919.

Trade Printers—Liability as to Libel, etc.

The foregoing paragraphs apply strictly to the statutory liability to affix the imprint. But the matter does not stop here in the case of libels, illegal publications, and infringements of copyright.

There can be little doubt that upon a strict interpretation of the law, in each of these cases both firms are liable. Especially in the first two classes of offences, if the matter is obviously objectionable the sub-contractor or trade printer has no defence. In special cases however where a technical offence only has been committed, such as failure to submit matter to the Censor, under the war-time "Defence of the Realm Act," the sub-contractor may only receive a nominal punishment.

In the case of infringements of copyright slightly different considerations arise, and the innocent printer may often escape with nominal damages. The following case is of particular interest¹ to trade printers. Here an order was given to print a directory, one part of which contained a piracy. The printer who received

¹ Kelly's Directories v. Gavin & Lloyds [1902], 1 Ch. 631, p. 74 *post*.

the order carried out a part including the title page which bore his own imprint, and this part contained no piracy. Finding he could not complete in the time required he informed his customer and relinquished the contract. The customer now found another printer who completed the part of work which included the piracy.

The owner of the copyright in due course brought an action against the publisher of the directory, and the printer whose name he found upon the title page. In the special circumstances it was found that the latter had neither "printed the work" nor even "caused it to be printed," and he was therefore under no liability.

Apart from these special circumstances both the contractor and the sub-contractor would undoubtedly have been liable for the infringement, and the question of imprint would only arise as barring the principal contractor from saying that he had nothing to do with the printing, after he had knowingly allowed his name to appear as the printer without making any objection.

Newspaper Titles.

The principles to be considered in relation to the ownership of titles raise questions which are dealt with broadly under the heading of Copyright. As however difficulties in this direction arise most frequently in connection with newspapers and magazines it will be convenient to examine some of the details at once.

The general law is, that there is no exclusive copyright in a title as such. No doubt if it can be established that the title is a *literary work* then it should be the subject of copyright; but since it has been frequently decided that there can be no such right in "hackneyed phrases,"¹ and in purely "descriptive words" it is usually better to adopt an alternative line. This is based upon the principle that it is a common law fraud to issue a publication under the name of an existing periodical with the intention of deceiving purchasers. The plaintiff will have to show that he has consistently used the title for such a period as to have given him a "reputation" in the mind of the public as the user of the title; and further he must prove some injury or probability of injury, which may arise by loss of circulation, or by loss of advertisements, or in any other way, before he can obtain an injunction restraining the other party from using the title of his publication.

The latter point was illustrated in a well-known case between the proprietor of a daily morning newspaper called the *Morning Post* and the owner of a later publication called the *Evening Post*.² There was no evidence of any actual injury having been done to the plaintiff, and it was held that although the similarity of the names might be calculated to cause confusion, and a supposition that some connection existed between the papers, yet as there was no proba-

¹ *Dicks v. Yates* [1881], 18 Ch. D. 76.

² *Borthwick v. Evening Post* [1888], 37 Ch. D. 449.

bility that the plaintiff would be injured by this supposition, an injunction must be refused.

Ownership of Titles.

Although in ordinary cases no copyright will be held to exist in the title of a newspaper, yet the right of publication under a particular name is subject to the ordinary law of property and is regarded as a chattel capable of assignment.¹ Thus upon the death or bankruptcy of the owner the right to use the title will pass to his personal representative or to his trustee in bankruptcy, and the latter will at the same time acquire the right in a proper case of preventing any other person from adopting the name. Property in the name of a newspaper may even be made the subject of mortgage, but such security would be of doubtful value in case of bankruptcy unless the mortgagee had registered himself as proprietor.²

Having regard to the special nature of this kind of property, where the whole value lies in public reputation, and is a sort of "goodwill," it is clear that if the title includes the owner's own name, then upon any sale or assignment the purchaser obtains an absolute right to the use of the vendor's name in this connection. This point was established many years ago in an action concerning the sale of a publication called *Beeton's Christmas Annual*.³

If however a partner's name forms no part of the title there is nothing to prevent his publishing a statement that he is no longer connected with the periodical, although he must not say anything which would be calculated to injure the periodical.

Dickens, some of whose novels appeared in serial form in *Household Words* and who was the editor and part proprietor of the magazine, was made a defendant to an action following an advertisement by him that the publication would be discontinued.⁴ It was said in the course of the judgment that the right to use the name must be sold for the benefit of all the partners, as part of the partnership assets, and Dickens was not entitled to advertise the discontinuance of the journal except as regards himself personally.

Publication for Purposes of Propaganda.

Difficulties in respect of ownership, and especially of the responsibilities of ownership, occasionally arise where a publication is issued to propagate the views of a meeting or other indefinite body of persons.

No publication can belong to an unincorporated society, although it may belong to a partnership of not more than twenty persons.

¹ *Kelly v. Hutton* [1868], 3 Ch. App. 703.

² *Re Baldwin ex parte Foss* [1858], 2 de G. & J. 230. C.A.

³ *Ward v. Beeton* [1874], L. R. 19 Eq. 207, p. 18 *ante*.

⁴ *Bradbury v. Dickens*, 28 L. J. Ch. 667.

If the question of ownership arise in the former case, it will be held that the person who actually paid for the publication is the owner.¹

Place of Publication.

In certain cases it may be of importance to determine exactly what is meant by this. Thus rather over a quarter of a century ago a well-known sporting paper called *Bell's Life in London* changed hands, and the agreement provided that the vendors should not print or publish any "sporting paper or periodical" within ten miles of Bouverie Street.²

The firm which had entered into this covenant owned a publishing business in Manchester, and issued a paper dealing with amateur sport, some copies of which were sold at their Fleet Street office. It was held that a paper was published when and where it was offered to the public by the proprietor, and was thus published at each office where it was sold. But since the paper in question deliberately excluded racing and betting intelligence, it was also held that it was not a sporting paper within the meaning of the agreement, although it was devoted to "sports" in one sense of the term. This seems a somewhat sad commentary on the meaning of the words "sporting paper."

¹ *Nazarbell v. Sevasley* [1896], December 5, *Times* newspaper.

² *Macfarlane v. Hulton* [1899], 1 Ch. 884.

CHAPTER VII.

DEFAMATION.

Although important Statutes deal with certain aspects of the Law of Libel, this subject has never been codified, and in the main therefore it is recorded in the decided cases.

What is Defamation ?

Any statement written or spoken, and any picture or representation which is calculated to bring a person into hatred, contempt, or ridicule is defamatory. In addition to this, any statement made by one person of another which is calculated to injure that person in his profession, trade, or calling is in the same category.

It was held not to be defamatory to describe a rival paper as the "Market Street Evening Ananias,"¹ because the words did not necessarily reflect upon the plaintiff's character. On the other hand it has been held libellous to say that a newspaper is "The lowest now in circulation, and we submit that fact to the consideration of advertisers."² Imputations of insolvency are defamatory, as are imputations of unchastity to women. On the other hand, it has been said that implications of incontinency in respect of men are possibly not actionable unless made offensively.

Innuendo.

A statement which to a stranger might appear unobjectionable, is none the less defamatory if it contains a secondary meaning which conveys a defamatory interpretation to some particular person to whom it is published.

It will be for the Judge to say whether the words are capable of conveying the alleged meaning, and the jury will decide whether this meaning is in fact conveyed.

Thus, if a builder were advised to buy his materials from a British firm whose honesty was unquestionable, this in view of the fact that he was actually purchasing from a foreign firm would contain an innuendo reflecting on the integrity of the latter.

¹ *Australian Newspaper Co. v. Bennett* [1894] A.C. 284.

² *Heriot v. Stuart* [1796], 1 Esp. 437.

Intention.

Where a statement is in fact libellous, it is not open to the defendant to plead that he intended nothing offensive. Further than this, the writer may prove that he used a name in complete innocence, supposing that he had invented it. If the real owner of the name has any reason to complain, it will be no defence to say that the writer had no idea any such person existed.

The Paris correspondent of a paper made the following comment in the course of an article: "Whist! there is Artemus Jones with a woman who is not his wife; really, is it not surprising how our fellow countrymen behave abroad?" It was held to be no answer for the defendant to say that he had never heard of a barrister of that name.¹

Suggested Change of Law.

It has always been felt that this rule is too harsh, and in 1926 Lord Gorell introduced a Bill in the House of Lords whereby:—

"No action shall be maintained in respect of any defamatory matter contained in a work of fiction, unless it is alleged and proved that the defendant intended to publish or published negligently such matter concerning the plaintiff."

Also wherever criminal proceedings were taken in respect of blasphemous, seditious, or obscene matter, contained in work published with the author's name, then if the author was not made a defendant to such proceedings he was to be given a reasonable opportunity of appearing and defending his work.

These proposals were somewhat too far-reaching and the Bill had to be dropped, but 1927 will see the introduction of a simplified and modified measure which it is hoped will remove this risk of serious injustice to authors.

The new Bill provides that in any action for libel the defendant shall have a good ground of defence if he proves that the writing and publication of the alleged libel by him were done:—

- (1) Without any intention of referring to the plaintiff; and
- (2) Either without knowledge of the existence of the plaintiff or without recollection of his existence or without anticipation of the possibility that the alleged libel might be read or understood as referring to the plaintiff; and
- (3) Without any want of due care or caution shown in failure to know or recollect the existence of the plaintiff or to anticipate the possibility that the alleged libel might be read or understood as referring to the plaintiff or in failure to take steps to prevent its being so read or understood.

Both measures are due to the efforts of the Incorporated Society of Authors, Playwrights and Composers in the interests of the writing profession.

¹ *Hulton v. Jones* [1909], 2 K.B. 481.

Libel and Slander.

A defamatory statement when written may constitute a libel, whilst the same statement, if only spoken, would be a slander. The latter does not concern us for the present purpose; it may however be said in passing that slander can never be the subject of *criminal* prosecution, whereas libel may.

Slander further is not actionable unless the plaintiff can point to the actual damage he has suffered, as for instance, loss of employment, whereas in libel the law "presumes damage." There are certain strictly limited exceptions to this rule, and in these excepted cases slander is held to be *actionable* "*per se*." The most important of these cases are words imputing misconduct in, or unfitness for a person's calling, and words imputing a crime punishable with imprisonment, and in these cases an action is maintainable without proof of special damages.

Civil and Criminal Libel.

The difference between these offences hinges largely on the question of publication. The law gives a man an *action* for libel on account of the material damage which he is presumed to have suffered. If the statement complained of has not been published to third parties, he cannot have suffered such damage.

A *prosecution* for libel on the other hand is based upon the idea of a possible breach of the peace, to which the person attacked may be supposed to be incited. Clearly this frame of mind is produced quite irrespective of publication to third parties.

The element of truth, or, as it is called, the defence of "Justification," reacts differently on the two classes of cases. In civil proceedings, if the defendant can prove the truth of his statement, he is entitled to a verdict, because the plaintiff had no right to the reputation which has now been taken away. In criminal libel it was formerly said, that "the greater the truth the greater the libel"; since an unpalatable truth is even more likely to bring about a breach of peace than a falsehood.

Lord Campbell's Libel Act 1843.

This statute has greatly affected the law of criminal libel. In the first place a defendant may now plead that his words were true, and if in addition he can convince the jury that publication was for the public benefit, he is entitled to a verdict.¹

In the second place, a statutory penalty of not more than a year's imprisonment (with or without a fine) is provided for the malicious publication of a defamatory libel; while if the offender knew that the libel was false, he incurs the risk of two years'

¹ Sec. 6.

imprisonment.¹ Threats to publish or to abstain from publishing libels are punishable under the Larceny Act 1916.²

Libels against Classes of Persons and Deceased Persons.

A class of persons cannot usually *sue* for libel, but where it is clear that a breach of peace was likely to ensue, a *prosecution* may lie in exceptional cases. For example, in the eighteenth century a prosecution was launched in consequence of a statement that certain Portuguese Jews in London had burned alive a Christian woman and her child, and the disturbances which had arisen in consequence. The defendant set up the plea that he had libelled no individual, but was convicted notwithstanding.³

Again it is settled law that no action will lie for defaming the character of deceased persons; since, however reprehensible such actions may be, the persons attacked are beyond the reach of material damage. It is certainly claimed sometimes that an "attack is made on the living through the dead," but this depends entirely on innuendo.

On the other hand in certain rare cases,⁴ where a breach of peace has actually resulted, e.g. a son taking extreme steps to defend the outraged memory of his father, it has been held that a prosecution was justified. The leave of the Attorney-General is required in such a case.

This question has recently received public attention through certain statements made concerning the late Mr. W. E. Gladstone, which were publicly and violently repudiated by his sons. The author brought an action for libel, but the defendant pleaded justification and won the day.

Sedition.

The law in regard to seditious libels is not applied with severity to-day. It is, however, an offence at Common Law to publish statements calculated to bring into hatred or contempt the Sovereign, the Government, the Houses of Parliament, or the Administration of Justice.

It is also a seditious libel to publish statements which attempt otherwise than by lawful means to bring about the alteration of any matter in Church or State by law established, or to promote hostility between the classes.

Action is only taken by the police in the most glaring cases, and doubtless in the present political condition of the country this is the wisest policy. In 1924 a prosecution for an offence of this kind

¹ Secs. 4 and 5.

² Sec. 31.

³ *R. v. Osborn* [1732], 2 Barn. 138, 166.

⁴ *R. v. Ensor* [1887], 3 T.L.R. 366.

was started, but was subsequently dropped; and the part played in the matter by the responsible department of the Labour Administration was an important feature in the General Election which followed.

Blasphemy.

It is a misdemeanour to publish words relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, *intended* to wound the feelings of mankind, to excite hatred or contempt against the Church, or to promote immorality.

The gist of the offence is the intention to injure public susceptibilities. It is no offence to publish heretical opinions provided the decencies of discussion are respected.

Suggested Change of Law.

Attention may be drawn at this point to a Bill before Parliament at the time of writing which will make it an offence :

“To print, publish, sell, distribute, or have in one’s possession for these purposes, any document containing seditious or blasphemous matter, with the intention of its being used for teaching children under 16 or being read to, sold to, or distributed amongst them.”

The maximum penalty is a fine of £50 and four months’ imprisonment; and there is special saving clause in respect of matter produced with the object of pointing out errors or defects in the Government or Constitution with a view to their removal.

Obscene Libels.

This class of offence is of very considerable importance. It is a condition of the qualified protection which is granted to newspapers against attack for libel in respect of *bona fide* reports of judicial and certain other proceedings,¹ that no obscene matter shall be published.

Quite apart from this, it is an offence to publish indecent books, papers or pictures. But it is clear that matter which in certain publications (e.g. medical books) would be free from offence cannot be tolerated when issued broadcast. The test is this “Is the tendency of the matter to deprave and corrupt those into whose hands the publication may fall?”²

A contract to print indecent matter is against public policy and unenforceable.

Contempt of Court.

Although not a part of the law of libel, the law dealing with contempt of court as it relates to publishers and printers must be briefly referred to at this stage.³

¹ See p. 37 *ante* [Registration under the Libel Act 1881.]

² *R. v. Hicklin* [1868], L.R. 3 Q.B. 360. See also ch. xiv, “Illegal Publications.”

³ See ch. xvii.

It is a criminal offence punishable by fine or imprisonment to publish *comments* on pending civil or criminal proceedings. Fair and accurate *reports* of the proceedings themselves, on the other hand, are under statutory protection.¹ It is owing to the application of this principle that a newspaper proprietor occasionally finds that his posters and headlines have got him into trouble (as comments), though the paragraph itself is irreproachable.

The jurisdiction of the Courts to interfere with such publication is sparingly exercised, the consideration being whether or not a fair trial will be prejudiced. The murder trial of Patrick Mahon in 1924 will be remembered as a recent case in which the Courts showed their disapproval of the undue interference in police investigations of certain energetic journalists in their anxiety to obtain "copy."

It appears that as soon as the cause is ended comments may be made, irrespective of any question of appeal. It is said at all events that there is no decided case to the contrary. Another point worth remembering is that a newspaper proprietor has no right before a trial to publish the contents of the writ, affidavits and pleadings.²

In an action for libel it is not a contempt to continue publishing the statement complained of after the issue of the writ. It is open to the plaintiff to apply for an injunction restraining such publication, but such an application is commonly refused unless the attacks are of the grossest and most unjustifiable nature. But although the plaintiff may quite rightly be refused his remedy before the trial, yet if he obtain a verdict the defendant's act in persisting in publishing the libel will be regarded as a serious aggravation of the offence when damages are being assessed.

Slander of Title and Trade Libels.

There are many statements which while not strictly libels are none the less actionable as tending to injure the plaintiff in the way of his trade.

A well-known case³ is that of a boilermaker who died leaving his business to his son. A newspaper published a statement to the effect that the concern had ceased to exist, and was held liable for damages. In regard to such actions it must be proved, first that the statement was untrue, and secondly that actual damage has accrued. General loss of business by reference to the books will suffice without evidence of the loss of particular customers.

Mere puffing of one's own goods is not actionable, even though it is stated incidentally that such goods are superior to any other trader's. Otherwise, as it has been said,⁴ the Courts would be

¹ See pp. 37 and 60.

² *R. v. Madge* [1913], 30 T.L.R. 10.

³ *Ratcliffe v. Evans* [1892], 2 Q.B. 524.

⁴ *White v. Mellin* [1895], A.C. 165.

turned into machinery for advertising rival productions by pronouncing judicial decisions on their merits. In that case the defendant sold the plaintiff's "Infant Food," affixing his own label to the wrapper, which recommended *his own brand* as being "far more nutritious and healthful than any other preparation yet offered."

Where this offence is to be made out "malice" must also be proved, but the word is here used in the restricted sense of "malice in law," which exists whenever a wrongful act is done intentionally without excuse, and is quite different from malice in the sense of "spite."

Injurious Falsehood.

The considerations affecting this topic are very similar to those dealt with above. In a very recent case a music-hall proprietor published of a pianist that she would appear at that hall during a certain week. The statement though made *bona fide* was untrue, and in consequence an offer of another engagement was not made to her. In the action which followed it was held that in the absence of any malice the plaintiff could not recover.¹

Indemnities.

A somewhat different problem arises when commercial competition is close, and trade feeling runs high. In these circumstances a printer or editor will often be asked to reproduce matter which he feels is on the border line, and dangerous. He must bear certain points in mind continually. When he is asked to unmask a fraud the first question is whether the matter is of public concern, so that his exposure will benefit the public. The next point is whether malice (i.e. spite) exists in the mind of the writer, or whether the statement is fair comment.

An editor or printer may in these circumstances be offered an indemnity in respect of the risk, or a publisher may demand such an indemnity from his author. The publisher should remember that in agreeing to do an unlawful thing (the publication of a libel) he is not giving any consideration which would entitle him to enforce the other part of the contract (payment of the indemnity).

On the other hand where these matters have been carefully weighed there is no reason why he should not proceed, provided the inducement satisfies him.

At least one enterprising London newspaper has achieved a reputation for making sensational exposures in this way, relying quite properly upon the defences of justification and public benefit in case of proceedings for libel.

¹ *Shapiro v. La Morta* [1923], 40 T.L.R. 201.

Insurance.

The question of indemnity is closely connected with that of insurance. Certain schemes are at present in existence to protect both newspapers and authors against libel actions. In one such scheme the company limits its risk to 90% of the sum recovered from the insured, while the 10% is left outstanding as a deterrent!

The Incorporated Society of Authors has also recently approved a form of policy of insurance against actions for libel and breach of copyright. As far as libel is concerned, the assured is indemnified against liability for damages and legal costs incurred: "In defending any legal proceedings which may be taken against him, in which it is alleged that in any of his works which are published or performed he has by the use of a name or names, or by the description of any character, scene or incident, or by any comment thereon or otherwise defamed any living person or persons."

The Case of *Smith v. Clinton*.

Now if this were all it is certain that the policy would not be enforceable against the company, except "in honour."

To begin with, any *deliberate* libeller will never be protected,¹ and it would be most serious if the law countenanced any bargain to protect a publisher against wrongdoing in this way; and the following case shows that the position of an ordinary publisher's indemnity is really no stronger. In 1907 the proprietor of *Vanity Fair* approached a firm of printers and placed a contract for printing and publishing the newspaper, sending them a letter in the following terms: "We hereby indemnify you against any claims whatever that may be made against you in respect of any libel that may appear in *Vanity Fair* during our proprietorship."

Shortly afterwards a libel on Parr's Bank appeared, and an action was brought in which £5,000 was recovered from the printers. The latter then sued the proprietors on the indemnity.

At the trial Mr. Justice Coleridge found that there was no accident or inadvertence, but that both parties had full knowledge of the libel, for it was "toned down" in consultation from its original virulence before publication.

The learned judge held that the contract of indemnity could not be enforced in law, and he said: "To indemnify against publishing a libel is to indemnify against doing a wrongful and illegal act; and it differs from the various forms of contracts of assurance against the illegal acts of others, in that the indemnity is given by one participator, in the wrongful and illegal act to another."²

¹ *Shackell v. Rosier* [1836], 2 Bing (N.C.) 634.

² *W. H. Smith & Son v. Clinton & Harris* [1909], 99 L.T. 840.

Effect of Innocence upon Indemnity.

Returning now to the form of policy, this provides further that the assured shall get no benefit from it, "unless it shall appear that the offence alleged has been committed unwittingly and unintentionally by the assured."

Clearly it will not always be easy to prove the lack of knowledge and intention which are requisite. But an even more serious question is whether even this clause saves the policy from being unenforceable, supposing the insuring company refused to pay.

The Case of *Tinline v. White Cross Insurance*.

The point was considered in 1921, in an action following a claim for damages for injuries in a motor accident. The assured while driving his car at an excessive speed had knocked down three persons, injuring two and killing the third, and was convicted of manslaughter.

The insurance company repudiated liability, although the policy indemnified the assured against sums which he should become legally liable to pay to any other person as compensation for "accidental personal injury."

The defence set up was, that where the negligence is so gross and excessive that as a result the crime of manslaughter is committed, the assured cannot claim an indemnity, for *it is against public policy to indemnify a person against the civil consequences of his criminal act*.

Mr. Justice Bailhache in his judgment said: "So far as I know this is the first time this defence has been raised upon an indemnity policy. Speaking generally, it is true to say that it is against public policy to indemnify a man against the consequences of a crime which he knowingly commits, and in the word crime I include the breach of any statutory duty which renders a man liable to fine or imprisonment.

"Lord Halsbury has said the law is not always logical, and everyone concerned with the administration of the law knows this. But if the law is not logical public policy is even less logical, for by common consent these 'third party' indemnity insurances have been treated as valid and effective.

"The fact that one of the persons was killed is really immaterial for the purposes of this case. It must of course be clearly understood that if this occurrence had been due to an *intentional* act on the part of the plaintiff *the policy would not protect him*. If a man driving a motor car at an excessive speed intentionally runs into and kills a man, the result is not manslaughter but murder. Manslaughter is the result of an accident and murder is not, and it is against accident and accident only that the policy insures.

"The point, as I have said, is a novel one but, for the reasons I have given, it fails."¹

¹ *Tinline v. White Cross Insurance* [1921], 3 K.B. 327.

Present Position of the Law.

The form of policy quoted is framed in accordance with the law as laid down in these two cases, so that as far as possible it shall come within the scope of the latter and not of the former.

The principle is that an insurance against accidental wrongdoing is enforceable, but the law will not allow deliberate wrongdoing to be protected.

The question is whether libel and infringement of copyright can now be brought within the first of these principles. Logically this should be possible, but in fact the point has yet to be tested, and "the law is not always logical."

Publication.

The offence of Defamation is not complete without *publication* to some third party except in criminal libel. In printed libels publication is usually necessarily admitted, but the question is more difficult when it arises in relation to manuscript and correspondence received by an editor or publisher.

Technically a libel is "published" if "copy" containing such matter is sent to an editor for perusal, but it has been said that such publication alone would not sustain a verdict. Where a letter however was dictated to a stenographer and sent to the plaintiff's office where it was opened by one clerk and read by two other clerks, this was held to be sufficient publication.¹ In subsequent decisions this case was distinguished on the ground that these were not ordinary incidents of business.

Similarly although a printed libel may not be circulated yet the printer and the publisher are both liable for the publication to the compositors and other workmen.²

But this cannot be relied upon as a universal principle, and as soon as any question of privilege arises it is certain that the protection will cover all the usual course of business.³ Even apart from this the Courts seem averse from applying the law laid down in *Pullman v. Hill*, for in another case where an inquisitive butler opened his master's letter and read the offensive matter there was held to be no publication.⁴ In this case the envelope was unsealed and bore a halfpenny stamp, and it was argued without success that it should be regarded as a post-card.

Merely to deliver a libel which is not read is not publication, and just as the writer's intention is immaterial as against the actual effect produced,⁵ so conversely if no effect is produced (e.g. the libel is not understood) it is submitted that there is no publication.

¹ *Pullman v. Hill* [1891], Q.B. 524.

² *Watts v. Fraser* [1837], 7 C. & P. 369.

³ *Edmondson v. Birch* [1907], 1 K.B. 371.

⁴ *Huth v Huth* [1915], 3 K.B. 32.

⁵ *Hulton v. Jones* [1909], 2 K.B. 481, p. 46 *ante*.

Accidental publication is not infrequent, and this may or may not afford a defence according to the measure of blame or negligence attributable. Thus where a dissolution of partnership was inserted under a heading of "Bankruptcies" £50 damages were obtained, although a full apology had subsequently been made.¹

Repetition.

It is never a defence in either libel or slander actions to plead that the defendant was only repeating another's statement. Each repetition is a fresh publication, although special circumstances may exist which will to some extent mitigate the defendant's liability. On the other hand, a defendant is not liable for unauthorized repetitions of his own statement, and such publication is no evidence against him.

Persons under Employment.

In the ordinary course of events therefore in a printed libel a number of persons may be liable—the author, the editor, the printer, the publisher, and the vendor. Proprietors are as much liable as their servants. For while no one can defend himself by showing that he committed an unlawful act under the order of another person, such other person is also liable for the acts of those he employs, provided the acts are within the scope of their employment. In a case of *criminal* libel however it is a good defence to show that publication was made without the defendant's consent or knowledge, and did not arise from want of due care on his part.

Author, Publisher, and Printer.

Nor is it any answer to an action for libel to show that upon publication the defendant disclosed the author's name²; and in fact an editor who wishes to shield his contributor is under no obligation whatever to give this information.³

Where the printer and the editor of a magazine are both sued for a libellous illustration contained in the magazine, then if the printer can show that he did not print the illustration he is only liable if the illustration is referred to in the letterpress.⁴

Book-Sellers.

But although the law in the matter of repetition of libel bears somewhat hardly upon the trades concerned, a reasonable measure of relief is afforded to news-vendors and the like, who cannot reasonably be required to read all the contents of the publications they retail.

¹ *Shepherd v. Whitaker* [1875], L.R. 10 C.P. 502.

² *De Crespigny v. Wellesley* [1829], 5 Bing 392.

³ *Gibson v. Evans* [1889], 23 Q.B.D. 334.

⁴ *Watts v. Fraser* [1835], 7 C. & P. 369.

In the leading case on the point¹ it is said that persons whose part in disseminating the libel was purely subordinate cannot be held liable if they can show that they did not know the contents, that there was nothing which ought to have led them to suspect that a libel was contained, and finally that it was not owing to any negligence that they did not know of the libel.

In another case² where a lending library continued to circulate a book after an action of libel had been successfully fought in respect of matter therein, it was held that the principle laid down in *Emmens v. Pottle* could not be extended to exculpate the proprietor.

¹ *Emmens v. Pottle* [1885], 16 Q.B.D. 354.

² *Vizetelly v. Mudie's Library* [1900], 2 Q.B. 170.

CHAPTER VIII.

DEFENCES IN LIBEL ACTIONS.

The principal defences to an action for libel may be considered separately under three headings—"Justification," "Fair Comment" and "Privilege." There is no such thing as a defence that no libel was intended. The Court is only concerned with the statement laid before it; the criterion is not what the defendant was thinking but what the world will think. Similarly it will be no defence to say that the writer did not intend to refer to the plaintiff, if reasonable people will suppose that he did so intend.¹

Justification.

For *any* defence to be successful the truth of material statements of fact must be established, but a defence of "justification" implies more than this. It is a specific counter-attack and an absolute persistence in the defamation. The word must not be taken in its ordinary sense of a person being warranted in making the assertion. It means that the defendant takes up a legal stand on the words complained of, and says that however defamatory they are, the words are true and he intends to prove it.

No withdrawal, apology, or mitigation of damages is compatible with this defence, and further it must be proved to the hilt. If it is not so proved the Court will consider the "unjustifiable" attitude of the party and will award exemplary damages. On the other hand if the defendant can make good his statement he will be protected, not because it is right to make the exposure, but because the law considers that the plaintiff has no right to complain if he loses a reputation to which he is not entitled. For these reasons it is usual to give a warning that the plea of justification, though right at times, is a dangerous one.

Fair Comment.

A very common method of drafting a defence of this kind is to say "that in so far as the words complained of consist of statements of facts they are true, and in so far as they consist of statements of opinion they are fair comment on a matter of public interest."

This plea is regarded in law as raising the defence of fair comment only, since the general truth of the facts alleged must always be proved.

¹ *Hulton v. Jones* [1909], 2 K.B. 481, see p. 46 *ante*.

In the first place the subject matter must be one of *public interest*. No one is warranted in urging this plea if he has maliciously given publicity to some purely private occurrence. But every one who takes part in public life must be taken to invite a certain degree of criticism of his conduct and work.

All matters of public administration and the public conduct of those who take part in them are thus open to comment. The same is true of other matters which invite public attention, such as entertainments, publications, architecture and so forth. A case is even reported where the plea was admitted in respect of a money-lender's conduct of his business.¹

In the second place the criticism must be *fair* comment. This does not mean that it must necessarily be accurate, or that the jury would have held the same view. But it does mean that it must not be inspired by motives of ill-will.

"Malicious criticism inspired by personal hostility can never be fair comment" as the principle was succinctly stated in a leading case; and again "criticism must not be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact."²

It can never be justifiable to impute corrupt motives for acts of public servants without specific evidence. On the other hand ridicule and the most stinging satire when properly directed at a proper object may proceed unchecked. A book has been reviewed as "the very worst attempt at a novel that has ever been perpetrated," with other scathing comment. An action was brought, but not fought to a conclusion. So long as the critic does not go beyond criticism, so long and no longer can he count on protection.

There is even now some doubt as to the effect of a finding by a jury "that the words complained of were defamatory, that they were true, but they were not fair comment," with an award of damages.

This was the finding in a recent action concerning a book on "Birth Control" by Dr. Stopes. The trial judge found that since the words were true, judgment must be for the defendant. The case went to the Court of Appeal, and ultimately to the House of Lords. The Court of Appeal reversed the judgment on the ground that the jury had found that the words were not fair comment, and gave judgment for the plaintiff.

The House of Lords restored the original finding, but the legal position was made no clearer, as it was said that there was no evidence on which the jury could base their finding that the comments were in fact unfair, and this part of the verdict therefore had no effect.³

¹ *Grey v. Labouchere* [1911], December 7, *Times Newspaper*.

² *McQuire v. Western Morning News* [1903], 2 K.B. 100.

Merivale v. Carson [1887], 20 Q.B.D. 275

³ *Sutherland v. Stopes*, H.L. [1925], 41 T. L.R. 106.

Privilege under Statute.

The law of privilege as regards *the press* is largely contained in the Law of Libel Amendment Act 1888. This is merely a statutory application to one part of the community of the principle that there are frequent occasions the very nature of which demands that that which was said or written in the performance of duty, or under some analogous obligation, should be protected.

This protection or privilege is considered under two headings: "Absolute privilege" and "Qualified privilege." The distinction is this, that whereas the immunity of Qualified privilege is lost as soon as a malicious motive for making the statement has been proved, in the case of Absolute privilege the question of malice is immaterial.

It is for the judge to say whether an occasion was in fact privileged, while the jury will decide the question of malice as and when this consideration arises.

Absolute Privilege.

It is no doubt common knowledge that no observation or statement made in the Houses of Parliament can be made the subject of an action for defamation. This is the reason of the challenge sometimes flung by one honourable member at another honourable member in which the latter is invited "to repeat some remark outside."

In addition to this, as the result of litigation nearly a hundred years ago between a person who regarded himself as injured and Hansard the official publisher of Parliamentary reports,¹ the Parliamentary Papers Act 1840 was passed, giving absolute privilege to papers published by the orders of either House.

All statements written or spoken in the course of proceedings in Courts of Law enjoy the same protection.² It should be observed, however, that while this does not extend to proceedings before licensing justices, it does cover courts-martial and coroners' courts.

Many official statements such as communications made between Government departments, and in the course of naval, military and civil administration, are similarly subject to absolute privilege.

As regards newspaper reports, the position is a little anomalous. Reports of *Court proceedings* enjoy *absolute* privilege, provided they are fair and accurate, are published contemporaneously and no blasphemous or indecent matter is published.² The new Judicial Proceedings (Regulation of Reports) Act 1926³ has cut away a large part of this protection, by prohibiting the publication of detailed reports of divorce cases.

¹ *Stockdale v. Hansard* [1839], 9 Ad. & E.I. 1.

² Law of Libel Amendment Act 1888, Sec. 3.

³ See p. 35.

On the other hand the law only extends a *qualified* privilege to reports of *public meetings*, and in view of this narrow distinction it is not easy to avoid confusion.¹

Qualified Privilege.

This form of immunity can be claimed, it will be remembered, in certain circumstances unless and until the plaintiff can show actual malice. On sufficient proof of this the defence of privilege breaks down. It will be convenient to discuss Section 4 of the 1888 Act first, and then proceed to the general question of common law qualified privilege.

In the first place, this statutory protection does not apply to all publications, but to newspapers only, and not magazines or monthly trade papers.² It applies to *reports* of public meetings, and not to journalists' comments. Meetings of *public bodies* where the public itself is excluded, and reporters are not admitted, are not included. Apart from this, the section contemplates all meetings of boards or local authorities formed under any Act of Parliament, meetings of Commissioners, select committees of Parliament, and justices of the peace in quarter sessions assembled for administrative or deliberative purposes.

The term "public meetings" is defined in the section as meaning any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance of any discussion of any matter of public concern, whether the admission thereto be general or restricted.

Reports.

The report must be fair and accurate, and contain no indecent or blasphemous matter. In addition the matter published must be of public concern, and for the public benefit.

Thus, where the report of a meeting of dock labourers included derisive personalities made by members of the audience concerning a speaker, the protection of Section 4 was held not to be extended.³

It is perhaps necessary to observe that headlines are not protected, and that care should be taken to ensure that both these and the posters do not give a false impression to the public.

Again, just as the law presumes a man innocent until he is proved guilty, so the law does not presume a crime or wrong to have been committed until the verdict has been given. For this reason it is better to speak of an "alleged" libel or an "alleged" crime when reporting judicial proceedings that are yet pending.

The statutory privilege extends to the actual proceedings only, and not to documents in the proceedings. A reporter who may have obtained any such documents with a view to saving trouble

¹ Law of Libel Amendment Act 1888, Sec 4.

² Newspaper Libel and Registration Act 1881, Sec. 1, and see p. 50.

³ *Kelly v. O'Malley* [1889], 6 T.L.R. 62.

must be exceedingly careful not to incorporate matter which would not have otherwise appeared in his shorthand notes.

Privilege Lost.

Once the statutory privilege is established, it can be lost in two ways only. In the first place, the Law of Libel Amendment Act 1888 provides that the statutory plea of privilege affords no defence in cases where the defendant was requested to insert a contradiction or explanation of the report complained of, and refused or neglected to insert the same.¹

In the second place there is no protection where the report was made maliciously; and a similar provision applies to the publication of *extracts* from Parliamentary papers, as opposed to the publication in the first place of those papers themselves, which enjoys absolute privilege.²

Qualified Privilege at Common Law.

Many *prima facie* defamatory statements which do not come within the statutory privilege are protected on more general grounds. For example, a letter written "for the defence and protection of a man's interests and rights, and without malice, is privileged, although it may impute dishonesty."³ When anyone is attacked in public, he is entitled to defend himself with the same publicity. There is a similar privilege in the case of statements made in the "discharge of some public or private duty"; and again privilege attaches where there is "an interest common to the person who makes the statement, and to the person to whom he makes it." Finally, statements made with the object of redressing public grievances, or preventing or punishing crime, are also protected when made *bona fide* and without malice.

The defence of privilege based on the "discharge of a duty" was exemplified in a case where a trade information bureau was concerned. The business of this organization was to make inquiries as to the credit, means and commercial reputation of persons whose names were submitted. Following on one unsatisfactory report, the secretary found himself sued for libel, but his plea of "publication on a privileged occasion" was very properly upheld.⁴

Very similar facts were also considered in relation to the plea of "common interest." In the last case the body was simply an association of traders for the purpose of protection, the offices were maintained by subscriptions, and no profit was looked for. In

¹ Section 4.

² Parliamentary Papers Act 1840.

³ *Coward v Wellington* [1836], 7 C.P. 536.

⁴ *London Association for the Protection of Trade v. Greenlands* [1916], 2 A.C. 25.

another case where the organization was independent, and carried on for the purposes of profit, there could be clearly no common interest between those who made the inquiries and those who supplied the information, and the statements were therefore not protected.¹

Another example of "common interest" arose in connection with a defamatory statement contained in the monthly circular published by a Railway Company to its servants. This periodical contained the name and circumstances of dismissal of one of their guards. The ground of dismissal being neglect of duty, it was held that the company had a common interest with their servants in making known the information.²

It must be carefully remembered that in all these cases of qualified privilege the protection is destroyed by malice. The very fact of publication to an unduly wide circle may be sufficient to establish malice; and in those cases where in fact there is no common interest, nor any duty to be discharged, it is quite useless for the defendant to say that he believed the contrary.

In regard to statements made to redress public grievances, and for the purpose of repressing crime, these are only protected when made to the proper person or authority, e.g. the head of a department of the public service.

Apology.

Just as on the one hand the law regards the plea of justification, when not made out, as an aggravation of the original libel, so it provides that where a proper apology has been tendered this may be pleaded in mitigation of damages. But there is an absolute condition to this statutory plea, and that is that a sum of money be paid into court at the same time.³

In the case of other actionable wrongs, a sum of money can be paid in this way, and at the same time liability may be denied. In the case of libel the liability must be admitted. The jury however must not be told of the fact of payment, and breach of this rule by plaintiff or his counsel is a sufficient ground for a new trial to be ordered.

There are two additional points to be noticed where the libel apologized for was contained in a newspaper or other periodical publication. The first of these is that the libel must have been inserted without actual malice or gross negligence. The second is that the apology must have been published either in the same newspaper at the earliest opportunity afterwards, or in the case of

¹ *Macintosh v. Dun* [1908], A.C. 390.

² *Hunt v. Great Northern Railway* [1891], 2 Q.B. 189 (O.).

³ Libel Act 1845, Sec. 2.

periodicals appearing at intervals exceeding one week, in any other publication selected by the plaintiff.¹

It must be remembered in this connection that the jury may find an apology was inadequate; it need not be abject, but it is dangerous to make reservations. The defendant's best plan at all times will be to allow his solicitor to draft the apology for him.

Another statutory plea in mitigation of damages is open to newspaper proprietors who can show that the plaintiff has recovered damages or compensation in another direction for a libel which is to the same effect as the one on which the present action is grounded.²

In the matter of libel generally, as in all matters which are left to juries to decide, it is impossible to obtain exact criteria, and apart from this consideration much depends upon public opinion at different times and places. For example the following dictum of the Supreme Court of Georgia may be regarded by some as perfectly reasonable, but there will always be others who disagree with it :—

“When the name of Washington shall grow cold to the ear of the patriot, when the Poles of the earth shall swing round to a coincidence with the Equator, then and not till then will it cease to be a libel to call a man a Tory.”³

¹ Libel Act 1843, Sec. 2.

² Law of Libel Amendment Act, 1888, Sec. 6.

³ *Giles v. The State*, 6 Cobb 284 [1849].

CHAPTER IX.

COPYRIGHT.

This section of the law is embodied in the Copyright Act, 1911. Certain references to other statutes which deal with kindred subjects, such as the Patents and Designs Act 1907 and 1919, will have to be made, but generally speaking the 1911 Act and judicial decisions on the subject matter together form the authority.

Definition of Copyright.

The first section of the Act lays down the area of the operation of copyright as being in "every original literary, dramatic, musical and artistic work"; and copyright as being "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever," and the essence of the subject lies in this statutory definition.

Originality.

No work can claim protection which is not original, and one of the principal difficulties in the application of the law is this very point. Piracy is comparatively easy to detect when the work infringed is entirely new, but it is a different question when reference to common sources is essential to the very nature of the work. In these cases clues can sometimes be discovered in errors which arose in the first transcription, and which have subsequently been copied.

The Act provides in terms that compilations are "literary works,"¹ and in proper cases even these will be regarded as original. Some years ago *Pearson's Weekly* arranged a "great picture contest" in connection with the names of railway stations. They prepared a printed list of such names for the use of competitors, using for this purpose the index to Bradshaw's Railway Guide. The proprietors of the latter publication succeeded in recovering damages in an action for the infringement of their copyright.²

Literary Work.

The Courts will not define what amounts to an "original literary composition," but they have definitely refused protection to the

¹ Sec. 35, p. 130 *post*.

² *Blacklock v. Pearson* [1915], 2 Ch. 376.

publisher of a periodical of lists of selected horses to win at races in the ensuing week.¹

A translation and summarization of a speech in Portuguese has been held to be an original literary work,² and so have examination papers set for the London Matriculation Examination.³

No Copyright in Ideas.

It must be remembered that there is no copyright in ideas; the language in which the idea is expressed is the only thing protected. For this reason it was held that there was no copyright in a card so cut that, when held up to the light, it cast a shadow resembling the well-known picture "Ecce Homo." It was further said that the plaintiff was the inventor of a trick, and not the author of a literary work, and this in spite of the fact that a title and printed instructions accompanied the card.⁴

Similarly no protection was afforded to a system of coloured cards in the nature of a card index for the classification of insurance cards, which also bore a few printed words,⁵ nor yet to cricket scoring sheets.⁶

Publication.

For works to be entitled to the automatic protection of copyright, (a) in the case of published works they must have been first published within His Majesty's dominions; and (b) in the case of unpublished works, copyright means the right to publish, and the author must at the date of making the work have been a British subject or resident within His Majesty's dominions.⁷

The question of the place of publication therefore becomes very material in the case of the work of foreign authors, and is considered in a later chapter on International Copyright.

Publication is defined for this purpose as meaning "the issue of the work to the public," and does not include public performance of dramatic or musical work, nor public delivery of lectures.⁸ But notwithstanding this special point of "publication," copyright includes the sole right of performance of dramatic works, and the conversion of dramatic work into novels. The copyright in lectures, dramatized novels, and artistic works will also be dealt with separately later.

¹ *Chilton v. Progress Printing Co.* [1895], 2 Ch. 29.

² *Byrne v. Statist Coy.* [1914], 1 K.B. 622.

³ *University of London Press v. University Tutorial Press* [1916], 2 Ch. 601.

⁴ *Cable v. Marks* [1882], 52 L.J. Ch. 107.

⁵ *Libraco v. Shaw Walker* [1913], 30 T.L.R. 22.

⁶ *Page v. Wisden* [1869], 20 L.T. 435.

⁷ Sec. 1 (1), p. 117 *post*.

⁸ Sec. 1 (3), p. 118 *post*.

This it will be noted is a much narrower definition of publication than the one recognized by the law of Libel. For purposes of Copyright a work is published if printed copies are gratuitously distributed to the public,¹ but if the work is only issued for private circulation it appears that it is not published, e.g. a report prepared by an engineer for a financial syndicate.²

In the case of an alleged infringement of musical or dramatic copyright by a "private performance," if the audience is such that there is a probability of injury to the owner of the copyright, it will be held that the performance was in public.³

Ownership of Copyright.

Subject to certain provisions, the Act lays down that the author of a work shall be the first owner of copyright therein.⁴ Thus where a song was composed for performance in Italian Opera and in defence to the author's action for infringement it had been set up that all compositions so performed were the property of the "house," it was held that this could not be supported, and that such property was vested in the author.⁵

Copyright in Letters.

Again the recipient or possessor of letters is not entitled to publish them or even extracts, and if they are written in confidence he is not entitled to communicate their contents to third persons. But subject to this, the right to use a letter does not depend upon the intention of the writer, and a person lawfully in possession of letters may use the *information contained* for the purpose of writing a biography without any authority from the writer.⁶

Work Done to Order.

But where a photograph, engraving or portrait is made to a customer's order and paid for, then the customer is the owner of the copyright. The generosity of enterprising photographers who offer to take portraits free, and present the sitter with a finished copy, is usually to be explained by the fact that they suppose the copyright has or may acquire some value, and therefore they prevent it from passing to the sitter in this way.⁷

Very little may suffice to support a plea of work done to order. In one case in 1925, an artist had merely changed the

¹ *Blanchett v. Ingram* [1887], 3 T.L.R. 687.

² *Kenrick v. Danube Collieries* [1891], 4 H.L. Cas 815, 962.

³ *Harms & Chappell v. Martan's Club* [1926], W.N. 245.

⁴ Sec. 5, p. 119 *post*.

⁵ *Storace v. Longman* [1788], 2 Camp. 27.

⁶ *Philip v. Pennell* [1907], 2 Ch. 577.

⁷ Sec. 5. (1) a, p. 119 *post*.

colours of a design at the request of the person to whom he wished to sell it.¹ The latter thereby acquired the copyright in the altered design.

Author under Contract.

Where an author is in the employment of some other person under a contract of service, his employer is (in the absence of any contrary agreement) the first owner of the copyright of work made in the course of his employment.² This provision only refers to ordinary contracts of service, and even here, where the work consists of articles and magazine contributions, the author's "volume rights" in respect of his collected work are automatically excluded by the Act subject again to any express agreement.³

An interesting example of authorship under contract was contained in the London University Matriculation Papers case mentioned above.⁴ In that case it was held that the copyright, vested in the examiners, that they were not under a contract of service within the meaning of the Act, but that they were subject to an obligation to assign the copyright to the University.

The point concerning publication in an unauthorized form has also arisen in respect of encyclopædia articles, and the rule has been made clear that the proprietor of the work cannot without the author's consent publish the article separately.⁵ And even in cases where a publisher has secured from the author the exclusive copyright for all purposes it has been held that actual payment for the work is an essential implied condition for the vesting of the copyright.⁶

Joint Authorship.

Adaptations and corrections do not suffice to give a collaborator a share in the copyright. There must be a clear preconceived design, and it is not enough only to suggest a subject. A lessee of a theatre employed an author to write a play, and afterwards altered it, inserting an additional scene. The author's receipt read thus: "Received of — the sum of £4 15s., on account of 15 guineas for my share as co-author, etc." The balance was never paid and it was held that there was no evidence that the lessee was a joint author.⁷

¹ *Con Planck v. Kolynos* [1925], 2 K.B. 804.

² Sec. 5 (1) b, p. 119 *post*.

³ See Ch. II "Contracts of Service and Volume Rights," p. 9 *ante*.

⁴ *University of London Press v. University Tutorial Press* [1916], 2 Ch. 601.

⁵ *Hereford v. Griffin* [1848], 17 L.J. Ch. 210.

⁶ *Richardson v. Gilbert* [1851], 20 L.J. Ch. 553.

⁷ *Levy v. Rutley* [1871], 24 L.T. 621.

Duration of Copyright.

The term for which copyright subsists is normally the life of the author and fifty years after his death. But at the expiration of twenty-five years from death anyone may reproduce the work for sale on condition of giving notice to the personal representative or other owner of the copyright in the prescribed form, and of paying him ten per cent. of the published price.¹

In the case of works in which copyright subsisted in the year 1911, the period at which the latter provision takes effect is thirty years after death instead of twenty-five.² Copyright in works of joint authorship ends fifty years after the death of the author who dies first, but if the surviving author is still living at the expiration of the fifty years, then for the period of the life of the latter only.³

In certain cases there is a fixed term of fifty years for the duration of copyright, viz. Government Publications,⁴ posthumous works (fifty years from publication),⁵ and photographs. The period in respect of photographs is reckoned from the making of the original negative, and the person who was the owner at that time is deemed to be the author.⁶

Assignments.

The Act makes provision for the assignment of copyright subject to any limitations that the parties agree, but all with one statutory condition. That is that no such grant is to be valid unless it is in writing signed by the owner of the right, or his duly authorized agent.⁷

In an old case it was held that evidence of the plaintiff's acquiescence in the defendant's publication of the copyright matter six years earlier was no proof of assignment, even though it was supported by a receipt for money paid as the price of copyright.⁸

Equitable Assignments.

This does not mean however that if the assignee can give clear evidence of a verbal agreement to assign, he is altogether without a remedy. The author if he has accepted payment is under a legal obligation to assign the copyright, and until he carries out this obligation the purchaser is an "equitable" though not a "legal" assignee.

In the event of piracy the equitable assignee can take action

¹ Secs. 3 and 5 (2), p. 119 *post*.

² Sec. 3 p. 119 *post*.

⁴ Sec. 18, p. 123 *post*.

⁶ Sec. 21, p. 126 *post*.

⁸ *Latour v. Bland* [1818], 2 Stark 382.

³ Sec. 16, p. 123 *post*.

⁵ Sec. 17, p. 123 *post*.

⁷ Sec. 5 (2), p. 119 *post*.

against the infringing party, but in view of a recent House of Lords decision he will be wise to make the author a co-plaintiff.^{1 2}

Term of Assignment.

The author is not free to assign the whole normal term of his copyright. The Act provides expressly that no assignment shall operate beyond the expiration of twenty-five years from the death of the author, unless it is made by will. Notwithstanding any other agreement that he may have made, the reversionary interest then devolves on his personal representative as part of his estate.

This provision does not apply to assignments of copyright in a collective work and in other cases its effects can be avoided by making proper testamentary arrangements.³

Licences.

This term is reserved for the grant of some particular interest in copyright, and arises frequently in relation to dramatic representations. Written evidence of the grant of the licence is essential.

Many years ago a declaration was sought on the part of a certain newspaper that it was entitled to the use of the matter and the type of the *Times*. The claim was based on a long-standing usage to make up this newspaper out of the last two preceding issues of the *Times*, but there was no agreement in writing. The declaration was refused on the ground that it was an attempt to convert a licence into a right, and that no grant could be presumed from long usage unless the origin of the usage was unknown.⁴

Another interesting case on this subject was brought in 1924 by the authoress of the "*Scarlet Pimpernel*." Some twenty years previously she and her husband had granted to certain theatrical managers the right of production of this story for a tour, and also for performance at a first-class West End theatre for two years. In the event of their producing the play within this period the *entire rights* for the United Kingdom, U.S.A. and Canada, became theirs inalienably, and they were to be free to present it when and where they would within the countries aforesaid, paying the authoress 5 per cent. of the takings.

The authoress sought a declaration that she had the sole rights to perform the work by cinematograph films. The Court held that this right was already vested in the defendants and the action failed.⁵

¹ Performing Right Society v. London Theatre of Varieties [1924], A.C. 1.

² Hodges v. Welsh [1840], 2 Ir. Eq. R. 266.

³ Sec. 5 (2), p. 119 *post*.

⁴ Platt v. Walter [1867], 17 L. T. 159.

⁵ Barstow v. Terry [1924], 2 Ch. 316.

CHAPTER X.

INFRINGEMENTS OF COPYRIGHT.

Infringements.

By no means all use of existing work is prohibited and thus it is of great importance to know what constitutes an infringement of copyright and what does not.

The Copyright Act defines the point fully. Copyright is infringed by anyone who *does anything*, the sole right to do which is by the Act conferred on the owner of the copyright, if done without the owner's consent.¹ It is also an infringement to sell or let for hire, to exhibit or distribute work, which a person *knows* to be itself an infringement of copyright.² Thus, in the first case the law assumes the offender's guilty knowledge, while in the second case the plaintiff must prove it.³

A "Substantial" Part.

An important point to be remembered is that there is no infringement unless the matter copied constitutes a *substantial* part of the publication.⁴ But this does not necessarily mean a large part. To use the vital section of a work may prejudice the sale of the original book, although the actual quantity is small.⁵

In the following case the general principle is well illustrated. An author wrote a school-book, assigned the copyright and agreed not to publish any similar work during the term of agreement. He then produced another book on the same lines with the same system of lessons, and in the action which followed he was held to have made an unfair use of the same material that he had drawn upon in the earlier work. The case did not turn upon any idea of actual copying, but rather upon unfair dealing.⁶

There is another case which is also of importance as illustrating one or two special points. The P. & O. Steam Navigation Co. required a code for internal work; they purchased a copy of an existing code book, and with its aid compiled their own private telegraphic code. This was not produced for sale but merely for distribution among the company's agents at home and abroad. It

¹ Sec. 2 (1), p. 118 *post*.

² Sec. 2 (2), p. 118 *post*.

³ See *post* "Who may be sued," p 73.

⁴ *Cooksley v. Johnson* [1905], 25 N.Z.I.R. 834; Sec. 1 (2), p. 117 *post*.

⁵ *Bramwell v. Halcomb* [1836], 3 My. & Cr. 737.

⁶ *Educational Co. of Ireland v. Fallon & Getz* [1919], 1 I.R. 62.

was held, notwithstanding, that the plaintiff's copyright had been infringed, and an injunction was obtained.¹ This case should be compared with those given in the last chapter under "Publication" of privately circulated work.²

What does not constitute an Infringement.

In proper cases however the incorporation of existing matter into new work may not constitute any breach of copyright, and it is of even greater value to grasp exactly what is meant by "*fair dealing*" than to form an ill-defined notion of the general right.

The Act contains a number of exceptions to the general rule which constitute statutory defences to an action for infringement of copyright.

Fair Dealing.

The first of these exceptions is by far the most important and must be closely considered.

"Any fair dealing with any work for the purpose of private study, research, criticism, review or newspaper summary, shall not constitute an infringement of copyright."³

The criterion is whether the author has or has not given real literary labour to the work, and whether that labour was honestly applied to the various sources of information. A transcript with colourable additions and variations is piratical, but there must be more than mere passages which have to be tracked through hundreds of pages.⁴

Quotations for purposes of review and fair abridgements or abstracts may be protected, but if in one number of a magazine there was a criticism, and then in the following numbers there were bare extracts, these would not be so protected.⁵ It has also been judicially said "that an abridgement where the understanding is employed in retrenching uninteresting circumstances is not a plagiarism, but an allowable and meritorious work."⁶

Acknowledged Use.

When original sources are properly acknowledged, the author will be acquitted of literary dishonesty; but this may not free him of liability for damages, because if in spite of this the sale of the original work is injured, the owner of the copyright is not to be deprived of his remedy by the fact that the injury was done openly.

¹ *Ager v. P. & O. Co.* [1884], 26 Ch.D. 637.

² Especially, *Harms & Chappell v. Martans Club* [1926], W.N. 245, p. 66 *ante*.

³ Sec. 2 (1) 1, p. 118 *post*.

⁴ *Jarrold v. Heywood* [1870], 18 W.R.279.

⁵ *Whittingham v. Wooler* [1817], 2 Swan 428.

⁶ *Anon.* [1774], 98 E.R. 913, L.C.

A case in point which was successfully fought by the proprietors of *Punch*, related to cartoons of Napoleon III, published between 1849 and 1867. After his fall in 1871 a book appeared concerning that monarch's life, one part of which was entitled "The same story as told by Popular Cartoonists." This part contained reduced copies of the *Punch* cartoons, and it was held that the proprietors of *Punch* were entitled to recover damages as their consent to such reproduction had not been obtained.¹

From time to time attempts have vainly been made to set up, by way of defence, a custom among newspapers, journalists and publishers to copy from one another in certain circumstances; but it has been decided that even if the practice were established it would not constitute a sufficient answer.²

There are certain works of the nature of compilations, such as directories and dictionaries, in which originality is out of the question. The test in these cases is the amount of real intellectual effort given, and an author must always acknowledge the use he has made of existing works.³

Finally we may remark on the topic of fair dealing a 1925 decision concerning a circular trade letter in which a manufacturer offered special rates to customers who undertook not to deal elsewhere in respect of a particular commodity. A competitor then took the step of further circularizing this same communication together with a covering letter of criticism. The first issue to be disposed of at the trial was a claim that the original circular was not entitled to protection in the interest of public policy as being "in restraint of trade." This objection was over-ruled, and in the judgment it was held that publication by a rival in the circumstances described was not "fair dealing" within the meaning of the Act.⁴

Parties to an Action of Infringement.

Any author who has not parted with his rights wholly or in part may maintain an action, and where he has made a proper assignment his assignee may sue.

It should be added that in spite of the statutory requirement that all assignments are to be in writing,⁵ cases necessarily arise where great hardships would be caused if this were made an absolute condition precedent to the assignee's right of action. Therefore it has been ruled that an equitable assignee can take action, notwithstanding that he has not obtained an assignment in writing, if he is in a position to compel a legal assignment.⁷

¹ *Bradbury v. Hotten* [1872], L.R. 8 Exch. 1.

² *Maxwell v. Somerton* [1874], 22 W.R. 313.

³ *Spiers v. Brown* [1858], 31 L.T. O.S. 16.

⁴ *British Oxygen Co. v. Liquid Air Co.* [1925], Ch. 383, see p. 32 *ante*.

⁵ *Hodges v. Welsh* [1840], 2 Ir. Eq. R. 266, and see Ch. IX, "Equitable Assignments," p. 69 *ante*.

⁶ Sec. 5 (2), pp. 69 and 119.

The question of co-ownership again is one which may give rise to difficulty, and such a case arose in respect of an important work on antique furniture, Herbert Cescinsky's "English Furniture of the Eighteenth Century."

The copyright was vested equally in the author and the publisher, the latter paying certain royalties. The publishers at a later date brought out a work by another author, which was an infringement of Mr. Cescinsky's copyright, and it was held that the author was entitled to an injunction against his own publishers, in spite of the fact that they were co-owners. The relevant words of the Act are, that there shall be an infringement by any person doing "anything the sole right to do which is conferred on the owner of the copyright";¹ and the reasoning followed was that "the owner" means all co-owners; and any one such co-owner may restrain an infringement, acting alone, even though the infringer is another co-owner.²

Who may be sued.

Any person may be liable who, without the consent of the owner of the copyright, *produces or reproduces* the work or any substantial part thereof, or authorizes the same.³

Further, copyright shall be deemed to be infringed by any person who sells or lets for hire any work which *to his knowledge* infringes copyright. It is sufficient if the infringing work is merely exposed for sale, and it is also an infringement to import such a work for sale or hire.⁴

In addition it is possible to obtain an absolute prohibition preventing the importation of such work, if the owner of the copyright gives proper notice to the Commissioners of Excise and Customs.⁵ It is in virtue of this provision that the cheap Continental "Tauchnitz" reprints of English authors and similar publications are excluded by the Customs officials.

Clearly then all persons engaged in *production* of an infringing work are liable, whether they are morally innocent or not; whilst actual knowledge must be proved in addition to make a distributor liable.

Where an exhibiting firm commissioned an artist to produce a poster depicting a lion, and he infringed another artist's copyright, it was held that the firm had not caused or procured a copy to be made contrary to the Fine Arts Copyright Act 1862.⁶

¹ Sec. 2 (1), p. 118 *post*.

² Cescinsky v. Routledge [1916], 2 K.B. 325.

³ Sec. 1 (2), p. 117 *post*.

⁴ Sec. 2 (2), p. 118 *post*.

⁵ Sec. 14, p. 121 *post*.

⁶ Bolton v. London Exhibitions, Ltd. [1898], 14 L.T.R. 550.

Again where a printing contract had to be carried out under pressure of time, work which turned out to be a piracy was handed over by the *publishers* to a second firm of printers for execution; in spite of this the original firm's name was shown on the title page, but they were held not to have committed any infringement in the circumstances.¹ The result would have been different if the first *printing* firm had *themselves* sublet the contract in the ordinary way.

These are of course exceptional cases, and are quoted to show the limits to which the rule as to liability extends, and the point beyond which it cannot be stretched.

Period of Limitation.

No action in respect of infringement of copyright is to be brought after the expiration of three years after the infringement.²

Remedies—Injunction.

The one general remedy of the aggrieved owner of copyright is to sue for an injunction.³ This is entirely irrespective of considerations such as that of guilty knowledge, and it is obviously good sense as well as good law in every case that the sufferer should be entitled to an order of the Court that the abuse shall not continue.

In cases of unusual urgency the plaintiff may be subject to serious additional damage by the very fact of the delay preceding the trial, and in these cases he will "move for an interlocutory injunction," which will be granted or refused on a *prima facie* argument. The plaintiff must show the urgency of the matter, and above all that there has been no delay or acquiescence on his own part. In order to save the expense of the trial of the action itself the parties sometimes agree to accept the decision on this preliminary application as final.

Any party obtaining an interlocutory injunction will be required to enter into an undertaking to be answerable for any damage which he may have occasioned to the other side by inducing the Court to grant him this relief, if it turns out at the trial that he was not entitled to it.

Undertaking not to continue Infringement.

It is of course always open to a defendant to seek a settlement during a dispute and before a writ is issued, on the footing of an undertaking that he will not repeat the act complained of, and will pay such damages as may be agreed. But a plaintiff is under no obligation to be satisfied with such an undertaking, and may quite properly press for his legal remedy, the injunction.⁴ If however the offer is repeated after the issue of the writ, and in addition the

¹ *Kelly's Directories v. Gavin & Lloyds* [1902], 1 Ch. 631; and see Ch. VI for "Liability of Trade Printers," p. 41 *ante*.

² Sec. 10, p. 121 *post*.

³ Sec. 6 (1), p. 120 *post*.

⁴ *Savory v. World of Golf* [1914], 2 Ch. 566.

defendant undertakes to submit to an order and to pay the costs to date, the plaintiff would probably be deprived of subsequent costs, if he again refused the offer and insisted on proceeding with the litigation.

The right of the Court to grant injunctions is very wide. In one case the complaint was merely that a publication was bound in such a way and in such a cover as was calculated to deceive intending purchasers of plaintiff's copyright book,¹ and even here an injunction was sought for and obtained.

Other Civil Remedies.

The Act provides civil remedies for infringement in the following terms: "The owner of the copyright shall be entitled to all such remedies by way of injunction, damages, accounts and otherwise, as are or may be conferred by law for the infringement of a right."²

And: "All infringing copies of any work in which copyright subsists, and all plates used or intended to be used for their production, shall be deemed *to be the property of the owner of the copyright*, who accordingly may take proceedings for the recovery of the possession thereof, or in respect of the conversion thereof."³

In addition to the injunction (and to the criminal penalties which will be considered separately), there are thus three civil claims: (1) For damages; (2) for an account; (3) for recovery or conversion. If the application for an injunction is refused, the Court will not give any other relief; but this is of course irrespective of the interlocutory application, which is only granted in clear cases.

Accounts.

In spite of the fact that the wording of the section makes it appear that the injunction, damages and account are concurrent remedies, the law is that the plaintiff must choose between the two last named. He may in a proper case obtain either of them in addition to his injunction and his remedy for conversion, but he will not get both.

Provided damages are not sued for, an account follows automatically on the injunction⁴; and the account is an account of *net profits* only. As a rule a more substantial claim can be made for "damages" than in an "account"; but the latter has the advantage that a plaintiff will obtain an order for full "discovery" of the defendant's books and documents for the purposes of the account, and this may stand him in good stead in his claim for "conversion."

¹ *Spottiswoode v. Clarke* [1846], 2 Phil. 154.

² Sec. 6 (1), p. 120 *post*.

³ Sec. 7, p. 120 *post*.

⁴ *Baily v. Taylor* [1829], 1 Russ & M. 73.

Damages.

The measure of damages is the loss sustained by the plaintiff, and the claim may or may not have any relation to the profit made by the defendant, but in any case it would seem to include this latter amount, together with such other sum as the Court presumes, or the plaintiff proves he has lost. This remedy is thus far more effective than a mere account for, and an order for payment of, the defendant's profits.

Such assessments of damages often seem exceedingly capricious. A typical case was that of a translation of a Portuguese speech inserted in a newspaper. The translation had been done by a journalist, who owned the copyright, and he was awarded £150 damages for infringement.¹

Conversion.

Unquestionably the most stringent of the remedies is contained in the section dealing with conversion. It is no longer a question of accounting for profits, nor yet of a fair deduction from receipts being made for the cost of labour, materials, and overhead charges.

The offending copies are deemed to be the *property* of the owner of the copyright. Thus in one case 1,010 pirated copies had been sold for £38 19s. 9d. showing a profit of £8 10s. 4d., and a further 29 copies had been sold with a profit of £1 4s. 2d. Damages for the conversion were assessed at £42.²

Apart again from this action of conversion in respect of the *value* of sold goods, the plaintiff has an action of "detinue" entitling him to delivery-up of the unsold stocks, all of which are regarded as his property.

Innocent Infringement.

As some sort of relief against the extreme severity of these provisions, the Act goes on to say that a plaintiff shall not be entitled to any other remedy than that of an injunction, if the defendant proves that he was not aware and had no reasonable ground for suspecting *that copyright subsisted* in the work.³

Whatever may have been the intention of the Legislature, this plea is to all intents and purposes valueless. The defendant must be presumed to know the law, which is that copyright exists automatically in the work of living writers and for a fixed period after their death. He cannot therefore in ordinary circumstances be allowed to claim that "he had no reasonable ground for suspecting that copyright subsisted."

Cases in which the plea has been accepted are all but unknown,

¹ *Byrne v. Statist Co.* [1914], 1 K.B. 622.

² *Muddock v. Blackwood* [1898], 1 Ch. 58.

³ Sec. 8, p. 120 *post*.

and presumably it would only be considered if the infringing party could show special grounds; e.g. that he reasonably believed the term of copyright had expired, or that the work was published in such a way and in such a country that no copyright existed here. In any case the burden of proof is on the defendant, and absence of carelessness is not enough.

A good example arose in the case of the Portuguese translation mentioned above.¹ The copyright was, as stated, *in the journalist* who translated a speech of the Governor of Bahia; the speech was published by one newspaper, and then the defendant newspaper sought and obtained *the first paper's* permission to copy it. The plea of innocence was set up, but the learned judge said that "the section affords no defence to persons who, *knowing that copyright exists, make a mistake as to the owner of the copyright*, and under that mistake obtain authority to publish from a person who is not the owner."

Thus every publisher is taking a risk in buying copy, in spite of any assurance he receives that the copyright is in the vendor; and in the event of an infringement his innocence will not excuse him.

Penal Provisions.

In addition to certain special punishments (provided by the Fine Arts Copyright Act 1862 and the Musical Copyright Acts 1902 and 1906) the Copyright Act 1911 lays down certain penalties applicable on summary conviction for infringement of copyright.

In every case the prosecution must prove that the offence was committed "knowingly," and this being a criminal provision is strictly interpreted. The fines are 40s. for every copy dealt with, with a maximum of £50; while second and subsequent offences may be punished with two months' imprisonment instead of the fine.²

The Court may also, whether the alleged offender is convicted or not, order that all infringing copies, plates, etc., be destroyed or delivered up to the owner of the copyright.

It has been held that any combination of persons to commit a piracy may be guilty of a "criminal conspiracy" to deprive the owner of the copyright of his property;³ and finally it is quite refreshing to be able to add that it has also been judicially said that the mere sale of pirated matter is *not* "larceny" at common law.⁴

¹ *Byrne v. Statist Co.* [1914], 1 K.B. 622.

² Sec. 11 (1), p. 121 *post*.

³ *R. v. Bokenham*, *Times* 22 July, 1910.

⁴ *R. v. Kidd & Walsh* [1907]. 72 J.P. 104.

CHAPTER XI.

PARTICULAR APPLICATIONS OF COPYRIGHT
LAW.**Immoral Publications.**

On grounds of public policy the Court will refuse to grant an injunction or other protection in respect of the copyright of works of an irreligious or immoral tendency.¹ Thus when an action was brought to prevent piracy of Lord Byron's poem "Cain," it failed because it was said to be doubtful whether the poem did not contravene the teaching of the Scriptures.²

On analogous grounds, piracy of certain books which tend to deceive the public has gone unchecked. In one case a trade catalogue described articles as "patent," contrary to fact,³ and in another a book entitled "Evening Devotions from the German," purporting to be a translation from a well-known German writer, was in point of fact composed by a little-known English author.⁴

News.

It is a fundamental principle of this branch of the law that there can be no copyright in an idea, and therefore it is obvious that there can be no copyright in *news* as such. It is the language in which the news is expressed only which is the subject of copyright, but it has also been decided that it is no defence to an action for infringement to say that it is the common practice of newspapers to copy from one another.⁵ It must be added however that there is a common law right of property in *unpublished information*, and this right will be protected in a proper case by injunction. The right in question here however is quite separate from copyright.⁶

Titles.

It appears that copyright cannot be claimed in respect of a title, unless such title is actually a literary work. The decisions on the

¹ *Glyn v. Western Feature Films* [1916], 1 Ch. 261.

² *Murray v. Benbow* [1822], 1 Jac. 474.

³ *Slingsby v. Bradford Patent Trunks* [1906], W.N. 51 C.A.

⁴ *Wright v. Tallis* [1845], 1 C.B. 893.

⁵ *Walter v. Steinkopff* [1892], 3 Ch. 489.

⁶ *Exchange Telegraph v. Gregory* [1896], 1 Q.B. 147; *Exchange Telegraph v. Central News* [1897], 2 Ch. 48.

point are somewhat conflicting, and it would seem that a safer ground of action exists in the common law right to prevent what is known as "passing off." For every man is entitled to be protected against the action of another who sells his books under a title which will lead the public to suppose that they were written by the plaintiff.¹

Maps.

The statutory definition of "literary work" includes maps, charts, plans, tables and compilations.² This includes birds'-eye views and the like; but the face or dial of a barometer has been definitely excluded,³ and so was a cardboard pattern sleeve containing scales for adaptation for other sizes.⁴ The date of this decision, 1894, fixes this case as a curious relic of a very pronounced late Victorian fashion.

Lectures and Speeches.

The Copyright Act provides that "it shall not be an infringement of copyright, in an address of a *political* nature delivered at a public meeting, to publish a report thereof in a newspaper."⁵

Also, among sundry special cases which are deemed not to be infringements of copyrights, is the publication in a newspaper of a *report of a lecture delivered in public*. But such *report* may be prohibited by the exhibition of conspicuous notices affixed at the main entrance of the building, and in a position near the lecturer.⁶ A proper newspaper *summary* is however never an infringement.

But the general copyright in lectures and speeches as distinct from these special provisions appears already to be secured by the general definition.⁷ They come within the general description of literary work, and the term "lecture" includes address, speech and sermon. Public delivery of such work is deemed not to constitute publication,⁸ and the author may thus claim the protection given to unpublished literary work; on this view the lecturer can restrain private individuals from publishing his work even though the notice referred to above in connection with newspaper reports was not exhibited.

Formerly the protection was not nearly so wide, and depended on whether the audience was restricted in some way, or delivery was entirely public.

¹ See Ch. VI under "Ownership of Titles," p. 42 *ante*.

² Sec. 35, p. 130 *post*.

³ *Davis v. Comitti* [1885], 54 L.J. Ch. 419.

⁴ *Hollinrake v. Truswell* [1894], 3 Ch. 420.

⁵ Sec. 20, p. 125 *post*.

⁶ Sec. 2 (1) v, p. 118 *post*.

⁷ Sec. 1 (2), p. 117 *post*.

⁸ Sec. 1 (3), p. 118 *post*.

In an interesting case,¹ Pitman, the inventor of the well-known system of shorthand attended, a scientific lecture, admittance being by ticket issued free. He subsequently published the lecture in his monthly magazine in shorthand characters, and an injunction was obtained against him for infringement of copyright.

Universities and colleges mentioned in the old Copyright Act of 1775 have special rights as to lectures which are retained in the 1911 Act.² But even apart from these rights, the unauthorized publication for purposes of gain, of lectures delivered in a college is an offence similar to "breach of confidence" and can be restrained.³

School Publications and Recitations.

Short passages of copyright literary works may be included in collections of mainly non-copyright matter, if the source is acknowledged. But any publisher is not to take more than two passages from the works of the same author within five years. Similarly public readings and recitations of published works, if done by one person alone, do not constitute any infringement.⁴

Dramatizations.

The law as to the dramatization of existing novels or other literary work has undergone a complete change within the last half century. Here as elsewhere in the realm of copyright this has consisted of a tightening up in favour of the owner.

Formerly it was possible to dramatize a novel without committing an infringement—although it was an act of piracy to print such a dramatization. On this point there is an illustrative case, showing how small an act suffices for a ground of action (in this as in every other case of "trespass" on an absolute right). The popular Victorian sentimental novel "Little Lord Fauntleroy" was dramatized without authority, many passages being copied; and the infringement on which the action was based was the making of one copy for the Lord Chamberlain and three copies for the actors.⁵

The position now is that copyright includes the sole right to convert any dramatic work into a novel or other non-dramatic work, and vice-versa.⁶

In the case of a conversion from a novel into a dramatic work such conversion may be by way of performance in public or otherwise; and copyright includes the authorization of such productions, performances, and publications.⁷

¹ *Nicols v. Pitman* [1884], 26 Ch. D. 374.

² Sec. 33, see p. 129 *post*.

³ *Caird v. Sime* [1887], 12 A.C. 326; Sec. 31, see p. 129.

⁴ Sec. 2 (1) iv and vi, see p. 118 *post*.

⁵ *Warne v. Seeborn* [1888], 30 C.D. 73.

⁶ Sec. 1 (2) b, see p. 117 *post*.

⁷ See p. 82.

Dramatic work is defined as including any piece for recitation, choreographic work, or entertainment in dumb show, where the scenic arrangement or acting, form—or the combination of incidents represented give—the work an original character.¹

Performing Rights.

In this connection a few remarks on the term “performing rights” may not be out of place. The Act gives the parties, as we have seen, the widest possible latitude as to the contracts they may enter into, in an assignment of copyright. Performing rights may thus be sold, and literary copyright retained.

Interesting arguments have arisen as to whether performing rights include cinema or film rights, and it has been held² that in the absence of any provision to the contrary they do; for the Act defines “performance” as meaning “any acoustic representation of a work, and any visual representation made by means of any mechanical instrument.”³

The cases which centred round the *tableaux vivants*, which will be remembered as a music hall novelty many years ago, illustrate the modern development in the nature of copyright.

In 1895 the Empire Palace Ltd. successfully defended such an action against a German artist who owned the copyright in the picture represented.⁴ In 1916 however an injunction and damages were obtained against a producer of variety entertainments for a precisely similar exhibition.⁵

Partial Assignment.

The wide rights of assignment conferred by the statute, subject to any limitations the parties may agree (and with the general proviso that no verbal assignment suffices),⁶ enable an author to assign full performing rights as we have seen, or performing rights from which cinema rights are excluded, or broadcasting rights or literary rights or any combination of rights in any localities that he may select.

Thus some years ago a cinematograph “film booking” company hired out certain films for exhibition at two places of entertainment and the exhibitors agreed not to show them elsewhere. In breach of their contract however they arranged further exhibitions, and made poster announcements accordingly. In the action which followed two interesting points arose; the one was that the

¹ Sec. 35, see p. 130 *post*.

² *Falcon v. Famous Players Film Co.* [1926], 134 L.T. 246.

³ Sec. 35, see p. 130 *post*.

⁴ *Hanfstaengl v. Empire Palace* [1894], 2 Ch. 1. C.A.

⁵ *Bradbury Agnew v. Day* [1916], 32 T.L.R. 349.

⁶ Sec. 5 (2), see p. 119 *post*.

exhibitor had infringed the plaintiff's copyright, in addition to breaking his contract; and the other was that the infringement was committed by merely *issuing the posters*. This was held to be an act "authorizing the production" and as such included within the sole right of the owner of the copyright.¹

Wireless.

By degrees the law relating to wireless is taking form. It does not appear to be entirely clear, for example, whether a defamatory statement which is broadcast constitutes a libel or a slander. Whereas the latter would seem to be the obvious answer, yet where the matter is first written out and passed for publication, it would appear that there must be a libel before the slander.

In the matter of copyright, in a recent case the status of the British Broadcasting Company in one respect was defined. This company issued a weekly magazine called the *Radio Times* containing *inter alia* the programme of the ensuing week's concerts and entertainments. Another publication, the *Wireless League Gazette*, in 1926 extracted such matter as they thought would be popular, referring their readers to the *Radio Times* for full details.

In an action for infringement of copyright the defendants claimed that the B.B.C. was a sort of subdepartment of the Post master-General, and that the copyright, if any, was in the Crown. But Mr. Justice Astbury ruled that the contention was unsound. But the change in control in 1927 may again materially affect the position.²

Burlesques.

Bona fide burlesques, and similar dealings with copyright work, have frequently been held not to constitute an infringement.³ In an amusing case some years ago, the original work was a postcard showing a soldier in a hot and exhausted condition, reading the "Orders of the day," and underneath were the words "And then we have the rest of the day to ourselves." The alleged infringement depicted the soldier reading the orders, with the same legend, but he was shown to be fresh and cool with his rifle on his shoulder. An injunction was refused.⁴

Similarly where a "reply" song is produced, based upon the words of a popular and successful song, this has been held not to be a "colourable imitation."⁵

¹ *Fenning Films v. Wolverhampton Cinemas* [1914], 3 K.B. 1171; Sec. 1 (2).

² *British Broadcasting Company v. Wireless League Gazette* [1926], 1 Ch. 433.

³ *Glyn v. Western Feature Films* [1916], 1 Ch. 261.

⁴ *McCrum v. Eisner* [1917], 117 L.T. 536.

⁵ *Francis Day & Hunter v. Feldman & Co.* [1914], 2 Ch. 728.

Musical Copyright,

Musical work, although the subject of protection under the principal Act, is also affected by certain minor enactments which deal with particular aspects.

An Act was passed in 1902 to put an end to street hawking of pirated music. This enables a Court of Summary Jurisdiction to authorize a constable to seize such music without warrant, and in certain cases the seizure may even be made on the bare written request of the owner of the copyright.

This Act was only a partial remedy of a serious abuse. The fact that such printed music did not carry the publisher's name nor the printer's imprint deterred the Legislature at first from attempting a more far-reaching reform. In 1906 however a second Musical Copyright Act was passed making printers and vendors liable for first offences to a £5 fine, and for subsequent offences to a £10 fine or two months' imprisonment. Hawkers of such music may now be arrested without warrant, following a general written request to the chief officer of police, and search warrants may be issued on sworn information.

The 1911 Copyright Act extends copyright to records, perforated rolls and similar contrivances, and lays down certain special provisions in this connection which need not be considered in detail for present purposes.¹

Authorized Versions of Bible and Book of Common Prayer.

The exclusive right to print these exists in the Crown by prerogative, and the same applies to Acts of Parliament and similar publications²; the right to print and publish the Bible and Prayer Book has been granted by letters patent to the King's Printer, and to the Universities of Oxford and Cambridge.

Bankruptcy of an Assignee of Copyright.

The Bankruptcy Act 1914 lays down that where a bankrupt person is under a liability to pay royalties to the author of any work, his trustee in bankruptcy is bound to safeguard the author's rights in all dealings with the bankrupt's estate.³

¹ Sec. 19, see p. 123 *post*.

² *Eyre v. Carnan* [1781], 6 Bac. Abr. 7th ed. 500.

³ Sec. 60.

CHAPTER XII.

COPYRIGHT IN DESIGNS.

Patents and Designs Act.

The law in respect of the unauthorized reproduction of designs is entirely distinct from that of copyright. It is to a great extent codified in the "Patents and Designs Acts 1907 and 1919," and protection depends upon registration.¹

Copyright it will be remembered exists automatically without this in other matters, including incidentally "artistic work"; but the Copyright Act does not apply to *Designs* capable of registration under the Patents and Designs Act 1907, unless such design is *not* intended for multiplication by process in quantities of over fifty.²

This provides a technical defence to certain actions for infringement of copyright.³ A very recent case on these lines arose in respect of the advertisement of a well known medicinal wine.⁴ The advertisement consisted of a "cut out" or silhouette card with a picture of a nurse and a bunch of grapes, which fitted on to the bottle for purposes of display. At the time of the alleged infringement the work had not been registered, and for this reason there could be no protection under the Patents Act; while the fact that it *was* in fact registered later precluded the plaintiff from claiming copyright in an "artistic work."

It will be readily understood that it is at times very difficult to say with any certainty at what point an "artistic work" becomes a "design" pure and simple. Thus it is possible that the "Ecce Homo" case, which was referred to in Chapter IX, would never have been brought, had it arisen after the 1911 Act became law, the plaintiff's position being untenable under section 22.

The acid test to decide the matter is to apply for the registration of the disputed "design," and this settles the question whether the work is really "artistic work" and automatically protected or not.

Definition.

In considering the law concerning copyright in designs independently of the Copyright Act 1911, it is necessary to start with the definition contained in the Patents and Designs Act.⁵

¹ Patents and Designs Acts 1907 and 1919, Sec. 53.

² Copyright Act 1911, Sec. 22, see p. 126 *post*. Designs Rules 1920, Rule 89.

³ *Con Planck v. Kolynos* [1925], 2 K.B. 804.

⁴ *Gunston v. Winox* [1921], 1 Ch. 664.

⁵ Sec. 93.

“Design means only the features of shape, configuration, or ornament applied to any article by any industrial process or means, which in the finished article are judged solely by the eye; but does not include any mode of construction or mechanical device.”

This definition is obviously framed with a view to marking the boundary between the subject matter of patent law and that of the law of designs. It would have been of value if the dividing line between “artistic work” and “design” had been equally clearly laid down. The difficulty is illustrated by references in the leading text-books on the subjects of advertisement posters and Christmas cards. Where the one (Macgillivray) regards the former as properly classified among artistic works and the latter among designs requiring registration—the other (Copinger) finds that both come within the Copyright Act as artistic works, and are automatically protected. According to the 1911 Act “artistic work” includes “works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs.”¹

A recent case on designs dealt with a device for conveying oil to the crank chamber of an internal combustion engine.² The article had been patented and its design registered. In an action for infringement the *patent* was held invalid for want of novelty, while the *design* was held valid and infringed by a fraudulent imitation. It was said that “on being viewed from one angle the designs were indistinguishable”; and³ this illustrates sufficiently well the application of the statutory definition.

Registration.

The Comptroller General of Patents Designs and Trade Marks may upon application of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom register the design under Part II of the Patents and Designs Acts 1907 and 1919 (consolidated). Such registration is a condition of copyright in the design.³

The proprietor may be (1) the person for whom the author of the design executed the work for “good consideration”; or (2) a person who acquires the design or the right to apply the design to any article (who becomes proprietor to that extent only); (3) in any other case he is the author of the design.⁴

Novelty or Originality.

For a design to be validly registrable, it should be new or original and many are the legal battles that have centred round

¹ Sec. 35, see p. 130 *post*.

² *Rose v. Pickavant* [1923], 40, R.P.C. 320.

³ Secs. 49 and 53.

⁴ Sec. 93.

these words.¹ Until 1919 the word "and" stood in the place of the word "or," and the change involved a subtle modification of the law, implying that now it will suffice if the design is "new," although it is not "original."

One of the most frequent defences to actions for infringement of design is "want of novelty"; and it was suggested in the combustion engine case quoted above that it might not be open to a defendant to raise this defence without a motion to rectify the register of designs by striking out the challenged design on the ground of "want of novelty."

The interpretation of this requirement is obviously one of the greatest difficulty, and the two following cases give the litigant on either side good ground to hope for a verdict. In the first it was said "There can be no originality or novelty in a design, which consists of a description of the article itself, as a particular arrangement of old and well known things." And further, "That if a design come within the definition, and is novel and original, the article complained of will not be an infringement of the design unless it is an exact reproduction, and any difference *however trivial* will protect it from being an infringement."²

This is certainly a clear statement of the law as it is actually applied, and as a result manufacturers in many trades place a minimum of reliance on the protection offered by the Act. No blame whatever can be attributed to the draftsman of the Act, for the section on piracy reads "It shall not be lawful for the purposes of sale to apply the design, *or any fraudulent or obvious imitation thereof, etc.*"

The converse application of the law was recently seen in a very salutary judicial condemnation of the well-known practice in the textile and wall-paper trades, by which any striking design is made the subject of "followers" in general imitation of the original, but differing in detail.

In this case (a wall-paper design) it was contended that the "follower" was not an infringement, and further that the plaintiffs' design itself was merely a combination of older ingredients. It was held that the new combination of old ingredients constituted a new and original design, and that in spite of differing details the defendant's production was a fraudulent and obvious imitation.³

Prior Publication.

It is a condition of valid registration that the design shall not have been previously published in the United Kingdom.⁴ But by way of safeguard another section of the Act provides that any one

¹ Sec. 49.

² Repetition Woodwork Co. v. Briggs [1924], 131 L.T. 556.

³ Wallpaper Manufacturers v. Derby Paper Staining Co., 42 R.P.C. 443.

⁴ Sec. 49.

of three things shall *not* be sufficient publication to invalidate copyright if registration is subsequently obtained.¹

The first is disclosure *by the proprietor* to another person in such circumstances as would make it contrary to good faith for the latter to use or publish the design. The second is disclosure in breach of good faith by any person *other* than the proprietor. The third is the acceptance of a first and confidential order for goods bearing a new or original *textile* design intended for registration.

The wine- tonic case referred to previously in connection with Section 22 of the Copyright Act was ultimately decided on this very point,² and the further circumstances are interesting. The plaintiffs, it will be remembered, were the designers of a "cut out" showcard advertisement for a patent wine with a nurse and a bunch of grapes. They first showed it to Winox Ltd. (the defendants) who did not give them an order. Then they showed it to the Premier Drug Co. as an advertisement for Liebig's Standard Wine. The Premier Drug Co. placed an order, and meantime the infringing design by Winox Ltd. appeared. An action was brought, and an injunction obtained in the High Court. The defendants took the case to the Court of Appeal, and obtained a reluctant reversal of the former decision on the ground that the later disclosure by the plaintiff to the Premier Drug Co. (not the first offer to themselves) was not within the three alternatives, and *thus constituted prior publication*.

Clearly the second alternative was not touched, for the disclosure was *by the proprietor*; nor yet the third, for the design was not for *textile* goods. And as to the first, it was said that seeing the Premier Drug Co. had placed a substantial order, there was no obligation laid upon them (the Drug Co.) not to tell anybody about it; and thus even this disclosure was not "a disclosure by the proprietor to another person in such circumstances as would make it a breach of faith for the latter to publish it."

Duration and Marking.

Copyright in a registered design extends for a period of five years only; but on application before the expiration of the term, it may be extended by two successive periods of five years each, making fifteen years in all.³

It is made a condition precedent to any recovery of a penalty or damages that the proprietor shall have caused each article to be marked in the prescribed manner denoting that the design is registered. But there is a saving clause for cases where the proprietor can show that he had taken all the proper steps to ensure the marking of the article; and also for cases where the infringing

¹ Sec. 55.

² *Gunston v. Winox* [1921], 1 Ch. 664.

³ Sec. 53.

party *knew* of the existence of the copyright of design in the unmarked article.¹

Piracy and Penalty.

The act of piracy consists in applying the design to any article in any class of goods in which the design is registered, and it is a piracy to do anything *with a view* to enable the design to be so applied.²

To come within the Act the infringement must be for purposes of sale; and fraudulent and obvious imitations are declared to be piracies no less than exact copies. The vendor, however, is only liable when he *knows* of the infringement contained in the goods complained of.

A person aggrieved may sue either to recover a penalty which is not to exceed £50 in respect of each contravention, or else he can sue for damages and an injunction. In no case may he recover more than £100 in respect of any one design.

The special reference to "classes of goods" must not be overlooked. It is not a piracy within the section to take a design and use it on articles outside its class of registration.

Groundless Threats of Proceedings.

An injunction can be obtained and damages recovered in cases where a person is aggrieved by circulars, advertisements, etc., threatening proceedings for infringement. The plaintiff will have to prove that he has not in fact committed an infringement, and further he will not get his injunction where the other side commence and diligently prosecute their action for infringement.³

Other Offences.

Falsely describing a design as "registered" is an offence for which a fine not to exceed £5 is imposed.⁴

The Fine Arts Copyright Act 1862, which was repealed on the passing of the Copyright Act 1911 with the exception of two sections dealing with certain fraudulent acts, must also be noticed. Affixing forged signatures to paintings, drawings and photographs, and offering such works for sale, are among the offences dealt with in these unrepealed sections. The maximum penalty recoverable is £10, or alternatively double the sale price.

Fraudulently copying or imitating paintings, etc., is similarly dealt with, and where work of this kind is altered after it has left the artist's hands it is an offence within the same category to offer

¹ Sec. 54.

² Sec. 60.

³ Sec. 61.

⁴ Sec. 89.

the production for sale as the artist's unaltered work. The artist's right of action here is not lost by assignment of copyright.

The well-known publishers, Raphael Tuck, were recently defendants in a case under this section.¹ In 1921 they bought the copyright in two pictures for the illustration of calendars and reproduced them unaltered. In 1924 they produced them again with alterations, this time omitting the plaintiff's signature, and an injunction and penalties were sought in an action in 1926. The learned Judge found that there was no representation, express or implied, that the work was the plaintiff's unaltered picture, and accordingly she lost her case.

Allowable Use of Artistic Work.

In considering special cases dealing with designs the main fact stated previously that copyright exists automatically in every "artistic work," under the 1911 Act, must not be forgotten; and that artistic work was defined as including works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art, and engravings and photographs.

The Act specifically allows the use of casts, plans, and sketches in regard to *details* so long as the main design is not imitated. Drawings and photographs of sculptures and works of art in a *permanent public situation* are also allowed to be made, but this does not include architectural drawings of architectural works of art.²

¹ *Preston v. Tuck* [1926], 1 Ch. 667.

² Sec. 2 (1) ii and Sec. 35, pp. 118 and 130 *passim*.

CHAPTER XIII.

INTERNATIONAL COPYRIGHT.

There are few departments of the law in which the rights accorded by foreign nations to any large class of English subjects are of more direct importance than in the law of copyright. It is of course impossible to give more than a brief outline of the situation in certain of its most practical aspects.

Berne Convention.

A Convention agreed to at Berne in 1887 was the outcome of efforts to simplify the position arising from the fact that certain countries had passed a number of reciprocal treaties securing a measure of copyright for their nationals. A revised Convention was signed in Berlin in 1908.

The countries concerned form the "Copyright Union," and the most important are:—

Great Britain, with some but not all of the Dominions and Colonies ;

Belgium	Denmark	Holland	Switzerland
France	Norway	Spain	Japan
Germany	Sweden	Portugal	

There are special and separate copyright treaties between this country and Austria.

United States.

The first and most important thing to notice is that the United States of America are not included in the Berne Convention, and since an English author's American rights are often of greater value than his British rights, the United States law will have to be carefully considered later.

The Principle.

The fundamental principle of the Berne Convention is expressed in Article 4: "Authors who are citizens of any of the countries of the Union, shall enjoy in countries other than the country of origin for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws grant to natives."

In 1912 it was enacted by Order in Council that the Copyright Act 1911 should (with certain reservations) apply to the Copyright Union.

It must not be thought however that these wide measures of protection give a British subject any right of action in English Courts for *foreign* infringements, in contravention of the Convention. In 1895 a case was brought here in which one Englishman sought to restrain another from producing and performing his play in Germany; he was very properly refused his injunction, the proper place to sue being the German Courts.¹

Duration.

An important provision of the Order is that the term or duration of Copyright in this country is not to exceed that of the country of origin of the work.

News and Articles.

In the case of newspaper *articles* the general rule is that reproductions by other newspapers (with proper acknowledgment) are allowed unless expressly forbidden in some conspicuous part of the newspaper in which the article is published, e.g. "Copyright throughout the World" or "World rights reserved." The protection of the Convention does not extend to *news* of the day, nor to miscellaneous information in the nature of news.

Prior Publication by a Non-Union Author.

The Convention binds its signatories to give the same rights to all authors whose country is outside the Union as authors within the Union enjoy, *in cases where the work is first published in a Union country*. It is thus impossible effectively to counter the American legislation which as will be seen bears heavily upon the rest of the world by requiring not only *publication* in U.S.A., but the entire process of manufacture to be carried out there including the setting of the type; since an American author need only publish his work first in England to obtain full protection.

United States Copyright.

For a very long period covering most of the last century, the piracy of English literature in the United States was nothing short of an international scandal. Probably no one suffered more from this than Charles Dickens, and his outspoken attacks on this abuse in the course of his American lecture tours aroused considerable resentment.

The position to-day is in so far improved that any author who feels justified in taking the necessary steps *can* obtain protection. That it is unsatisfactory from any practical viewpoint is seen by

¹ Morocco Bound Syndicate v. Harris [1895], 1 Ch. 535.

the fact that the great bulk of English literature is, in point of fact, unprotected.

The Principle.

The American legislation is not framed with any sense of the value of International copyright, for no work produced outside U.S.A. can gain protection, unless it is *also* produced and published within the United States. The most important statute on the point was the Chace Act of 1891, and a number of amending and consolidating Acts have been passed since.

Duration.

American copyright runs for a maximum of fifty-six years, but certain formalities have to be observed at the end of the first twenty-eight years to secure protection for the full period.

Special Requirements.

The special requirements are, first, a "copyright notice" upon the title page or following page of a book; next registration and deposit of one copy at the Copyright Office; further the general law is that the work must be published in America either first or at least contemporaneously with publication elsewhere. A special interim protection may however be obtained for English works by deposit within thirty days after publication abroad, with a request for reservation of copyright; and this protection runs for another thirty days from the date of deposit.

The regulations mentioned hitherto are not unreasonable, but a further provision renders much of this quite nugatory.

This is the notorious "manufacturing and typesetting clause," *which applies exclusively to work in the English language*. This clause requires the books for which copyright is to be obtained to be printed from type set up within the United States and the binding and the whole of the manufacture must be carried out there. Comment is needless.

Colonial Copyright.

The Copyright Act 1911 has been extended by Order in Council to all the Colonies, but not to the self-governing Dominions.

Australia, New Zealand, and Newfoundland have adopted the Act with certain reservations. South Africa was somewhat later in falling into line, but in 1916 an Act was placed upon the Statute-book of the Union bringing the English Copyright Act into force in its entirety.

The general rule in the Copyright Act 1911 in this connection is, that in self-governing dominions to which that Act does not extend the former copyright enactments dealing with Imperial copyright are to continue in force unless and until they are repealed locally.¹

¹ Sec. 26 (2), see p. 127 *post*.

The principal provision of the old law on this point was contained in the Copyright Act 1842 which gave *Imperial rights* to persons acquiring copyright by first publication in the United Kingdom.

Canada.

The Canadian position is somewhat difficult. Canadian Acts of 1875 and 1886 confer copyright to certain persons and on certain conditions for a term of twenty-eight years renewable for a further fourteen years. The persons eligible are persons domiciled in Canada, the British Dominions, and citizens of countries in the Copyright Union. The conditions are analogous to those in force in U.S.A., and require local manufacture (but the type need not actually be set up in Canada), registration, deposit, and notification of copyright on the title page. Interim copyright can also be obtained.

Dual Position.

Apart from this however Imperial copyright subsists under the 1842 Act, and for many years Canada found herself flooded with importations from England and America, while the Berne Convention only intensified her difficulties by enlarging the field of her competitors.

In 1900 she therefore passed a further Act giving power to exclude work which is copyright in Canada, and has previously been published elsewhere in the British Dominions. It has been suggested that this measure was unconstitutional, since Sec. 26(2) of the Copyright Act 1911 kept alive the 1842 Act with its Imperial Copyright for such Dominions as did not adopt the new Statute of 1911. Further legislation was badly needed to rectify the anomalies of the situation, but it was clear that no English-speaking neighbour of the United States could for a moment consider adopting the principles of the Berne Convention in their full application.

The 1914 Protocol.

A Protocol to the Berne Convention in 1914 was of importance to Canada, inasmuch as it gave Union countries the right to reserve the necessary protection against abuses by Non-union countries (of which U.S.A. is the chief). The gist of the document is to the effect that members of the Copyright Union are to be free to impose restrictions, in respect of the work of authors belonging to Non-union countries, in cases where those countries do not give adequate protection to authors within the union.

Canadian Adherence to Convention.

Accordingly in 1923 the adherence of Canada to the Revised Convention of Berne 1908 was declared, subject to a restriction in

regard to the United States of America. The following passage in the revised Convention is of particular importance: "Apart from express stipulations, *the extent of protection, as well as the means of redress*, shall be governed exclusively by the laws of the country where the protection is claimed." This ensures to Canada the continuity of her internal regulations, while adherence to the Convention will form an effective check to piracies in other countries.

Translations.

Under the Copyright Act 1911, the sole right to translate is included within the author's copyright;¹ but without prejudice to this, a translation is entitled to protection as an "original literary work."² Further under the revised Berne Convention authors enjoy full translation rights for the whole term of their right in the original work, provided such work was first published within the Union.

In an interesting case on this point which is, however, not of recent date, a French play called "Frou-Frou" was reproduced as an English play "Like to Like" with considerable alterations and omissions. The English adaptation was registered by the plaintiff, and the defendant proceeded to stage the French original. An action was brought but the protection sought for the English piece was refused upon the ground that the translation was not accurate.³ Some twenty years later it was held that a translation need not be absolutely literal, provided it was substantially a translation⁴, and it may well be that to-day the law would be applied even more widely.

¹ Sec. 1 (2) *a*, see p. 117 *post*.

² *Byrne v. Statist Company* [1914], 1 K.B. 622.

³ *Wood v. Chart* [1870], 39 L.J. Ch. 641.

⁴ *Lauri v. Renad* [1892], 3 Ch. 402.

CHAPTER XIV.

ILLEGAL PUBLICATIONS.

There are many unlawful publications apart from those within the scope of the following chapters. Libels and infringements of copyright for example have been dealt with under their respective headings; certain statements contained in company prospectuses will, if untrue, enable subscribers to claim compensation from the directors. And apart from these special cases, there are many other statements which render the person making them liable for the loss or damage suffered by other people.

Publications against Public Policy.

And even where there is no liability for damages, the circumstances may be such as to render the making or with-holding of certain statements objectionable upon grounds of public policy. Thus in a recent case¹ the plaintiff who was a director of a Canadian land company entered into an agreement with the defendants who were proprietors of a weekly newspaper which purported to give advice to purchasers of Canadian land. Under this agreement the plaintiff was to forgive the defendants one half of a debt of £1,490, and the latter undertook to publish no comments upon the plaintiff's land company. Upon breach of this agreement an action was brought to recover the balance of the money and it was held that the agreement was unenforceable on this ground amongst others—that the undertaking was void as being against public policy, inasmuch as it was not consistent with the proper conduct of the newspaper in the public interest.

Publications Illegal by Statute.

What is contemplated as the subject matter of the present chapter is rather the sort of publication that has been made a criminal offence by specific statutes; although even this is hardly accurate, since the Post Office regulations contain provisions that are very material in this connection.

Extract from Post Office Guide, 1926.

The Inland Post Warrant of 1923 contains the following: There shall not be posted, or conveyed, or delivered by post any postal packet—

¹ *Neville v. Dominion of Canada News* [1915], 3 K.B. 556.

Consisting of or containing any indecent or obscene print, photograph, book or card, or an indecent or obscene article ;

Having thereon or on the cover thereof any words, marks, or designs of indecent, obscene, or grossly offensive character ;

Having thereon or on the cover words, letters, or marks (used without due authority) which imply that the postal packet is sent on His Majesty's Service ;

Having thereon or on the cover thereof any words, marks, or designs of a character likely to embarrass the Officers of the Post Office in dealing with the packet in the post.

Further the transmission by post of any postal packet is forbidden if it contains:—

Any advertisement or ticket relating to a lottery, at home or abroad ; or

Any advertisement issued by or on behalf of any person, at home or abroad, offering to tell fortunes ; or

Any advertisement of a Betting House at home or abroad ; or any advertisement or coupon of any ready-money football-betting business at home or abroad ; or

Any advertisement relating to the treatment of venereal disease, or to any preparation for its prevention, cure, or relief, except in the case of packets addressed only to duly qualified medical practitioners or chemists for the purposes of their business.

Transmitting Indecent Matter.

The above regulations are made under powers contained in the Post Office Act 1908, which also specifically prohibits the transmission of such productions, and provides a fine of £10 on summary conviction, or imprisonment for not more than twelve months on conviction on indictment.¹

It appears that a newspaper editor who advertises indecent productions, so that readers may obtain them through the post, may also be convicted under the section.²

The importation into the United Kingdom of indecent or obscene prints, photographs, books, etc., is prohibited by the Customs Laws Consolidation Act 1876.³

Selling Indecent Books, etc.

The Town Police Clauses Act 1847 ⁴ makes it an offence punishable by a fine of 40s. or fourteen days' imprisonment, "publicly to offer for sale or distribution, or to exhibit to public view any profane, indecent or obscene book, paper, print, drawing, painting or representation."

¹ Secs. 16 and 63.

² *R. v. De Marny* [1907], 1 K.B. 388.

³ Sec. 42.

⁴ Sec. 28.

Where complaint on oath has been made to a Bench of Justices, that obscene matter is kept in any house for the purpose of sale, they may give authority by special warrant for breaking in and searching, under the Obscene Publications Act 1857.¹

If the publication is in fact obscene, an offence is committed although there may have been no intent on the part of the publisher to corrupt morals.²

Exposing Indecent Matter.

The offence of exposing, independently of selling, is dealt with by the Vagrancy Acts of 1824³ and 1838,⁴ and also by the Indecent Advertisements Act 1889.⁵

The Vagrancy Laws mentioned make it an offence "wilfully to expose to view in any street, or public place, or in the window or other part of any shop or other building situate in any street or public place, any obscene print, picture, or other indecent exhibitions."

The Act of 1889 makes it an offence (40s. or one month) to affix indecent matter to any house, board, tree, etc., so as to be visible to any person passing, or delivering the same to persons passing, or throwing such matter down the area of any house, or exhibiting it to public view in any window.

It is a more serious offence to employ other people to do the prohibited distribution, and accordingly this is punishable with a fine of £5 or three months' imprisonment.

Advertisements relating to venereal disease are deemed to be indecent matter within the meaning of this Act, if affixed to any house, etc., so as to be visible to any person passing.

The Venereal Disease Act of 1917 makes it an offence to advertise treatments or remedies for these complaints, other than notifications authorized by Local Government Boards, and professional publications. The maximum punishments are £100 fine or two years' imprisonment.

It is interesting to notice that in 1926 it was said by a representative of the Director of Public Prosecutions that cases under this Act were extremely infrequent, and that previous to the case in which he was then acting he had only had one similar prosecution.⁶

Printing and Publishing Indecent matter.

It seems not a little remarkable that whereas almost every conceivable public dealing with indecent printed matter is a statutory offence, the actual printing is not. It is however a common law

¹ Sec. 1.

² *R. v. Hicklin* [1868], L.R. 3 Q.B. 360.

³ Sec. 4. ⁴ Sec. 2. ⁵ Secs. 3-5.

⁶ [1926] June 23, *Times* newspaper.

misdeemeanour to *publish* indecent matter tending to deprave and corrupt.¹ And when the natural effect of the publication is of this kind, it is entirely beside the mark for the defendant to say that the publication was for a salutary purpose and not for purposes of gain.

The case last quoted was an example of this, dealing as it did with a pamphlet called "The Confessional Unmasked," an anti-Catholic polemic, a part of which detailed the questions on matters of sex which were said to be administered in the confessional.

Medical books on the other hand will always be excepted, since they are published for a particular and not a general purpose, and it would be ridiculous to suggest that they had a corrupting tendency.

At common law the fact of printing will constitute "publication," and apart from the question of this criminal offence, any contract to print indecent matter is against public policy and unenforceable.

Fortune-telling.

Pretending or professing to tell fortunes, and to do palmistry, are offences against the Vagrancy Act 1824,² and the defendant's *bona fide* belief in his powers is no answer.³ Offering by advertisements in newspapers to "cast nativities" and so forth, is sufficient evidence of pretending to tell fortunes without further proof of actual communications.⁴

¹ *R. v. Hicklin* [1868], L.R. 3 Q.B. 360.

² Sec. 4

³ *Stonehouse v. Masson* [1921], 2 K.B. 818.

⁴ *Penny v. Hanson* [1887], 18 Q.B.D. 478.

CHAPTER XV.

COMPETITIONS.

The largest and most important body of law relating to illegal publications is unquestionably on the subject of gambling in one form or another. Since the days of Queen Anne, no less than a score of Acts of Parliament have been placed upon the Statute Book dealing with gaming and lotteries, so that legislation on the subject at the present time is, to say the least, somewhat chaotic.

To bring all this matter within a manageable compass it is essential to omit as far as possible all reference to the law except as regards printed publications, and it may then be conveniently dealt with under three headings.

The first will include Competitions and Advertisements of Lotteries; the second will deal with Advertisements of Betting and Betting Houses; and lastly will be considered Betting and Money-lending Circulars to infants and adults.

Lotteries.

A lottery is a scheme for distributing prizes by lot or chance,¹ and a competition which falls within this definition usually comes within the Lottery Acts.

The first Lottery Act which made it an offence to print, publish and advertise proposals for lotteries was passed in 1721, and the enormous penalty of £500 was provided, in addition to a year's imprisonment. This sum was divisible into three parts, of which one was claimed by His Majesty, one by the informer, and the remaining third part went to the poor of the parish where the offence was committed. The recovering of penalties by common informers is now regarded as a discredited method of enforcing penal legislation, and the pecuniary penalties for any offence concerning lotteries are recoverable only at the suit of the Attorney-General and are claimed wholly by the Crown.²

The next Lottery Act passed the following year (1722) was intended to prevent foreign lotteries being carried on in the kingdom; the penalties for printing or publishing proposals or schemes, or selling or disposing of tickets, were similar to those in the previous Act, except that the sum to be forfeited was only £200.

¹ *Taylor v. Smetten* [1883], 11 Q.B.D. 207.

² Lotteries Acts 1806 and 1845.

Printing and publishing proposals or schemes for raffles are offences under the Gaming Act 1738, the penalty being £200.

A number of other Acts deal with these offences, and there is an extraordinary amount of overlapping. Thus it is an offence by writing or printing to publish the setting up of a lottery with the intent to have such lottery drawn (Lotteries Act 1736, penalty £100); to publish proposals for lotteries (Gaming Act 1802, penalty £100); to publish proposals for sale of tickets in any lottery, foreign or otherwise (Lotteries Act 1823, penalty £50), and the offender is to be punished as a rogue and vagabond; to advertise foreign or illegal lotteries (Lotteries Act 1836, penalty £50); to import notices or advertisements of lotteries intended for distribution in this country (Revenue Act 1898).

In addition to this heterogeneous mass of prohibitions specifically directed against printers, publishers and distributors, there are of course those directed against the main offences of actually holding lotteries, illegal games, raffles, etc.; and printers and publishers are once more liable under these main prohibitions, as "aiders and abettors."

Competitions.

It is no doubt sufficiently well understood that ordinary lotteries, where the money prizes are provided by the sale of tickets, are not tolerated in this country. The difficulty arises in connection with games and competitions which are "deemed to be lotteries," and a number of these cases will now be considered.

A clear distinction must be drawn between competitions based upon the selection of winning horses or football teams, where skill is involved and such chance as enters does not arise within the promoter's office, on the one hand, and on the other, "Missing Word" and "Limerick" competitions, where although again skill contributes to the result, yet the final *selection* by the promoter of the winning competitor may be in some way a matter of chance.

Competitions of the former type may or may not be offences against the Betting Acts, and will be dealt with later, as they do not ordinarily infringe the Lottery Acts. Competitions of the latter kind cannot be betting offences, but not infrequently they do constitute lotteries.

Missing Word Competitions.

A case that is frequently quoted in this connection was decided as long ago as 1893.¹ Here a paragraph in a newspaper was printed without the last word, and readers were invited to fill in a coupon with the correct word, and send it in together with one shilling. The promoter said that the winning word was in one of a number of sealed envelopes each containing a suitable

¹ *Barclay v. Pearson* [1893], 2 Ch. 154.

word, and in the hands of a chartered accountant, and that the choice of the winning word would be by hazard, after the competition had closed ; and further he said that the whole of the entrance money would be distributed in prizes. The successful competitors having commenced an action-at-law for their winnings, it was held that the competition was illegal and a lottery, and that *all competitors* were entitled to the return of their entrance money provided they had given notice of their claim before the money was distributed.

Limericks.

The enormous popularity of these competitions twenty years ago is only equalled by the present rage for cross-word puzzles. At that time, however, it was not yet realized that the competitions themselves provided an ample attraction for an idle public, and that prizes are in point of fact superfluous.

The Limerick competitions consisted in the invention of a clever concluding line to a doggerel verse, and in the case now quoted¹ no less than £300 was offered by the enterprising publisher for the best "last line." The entrance fee was sixpence and it was advertised that every coupon would be examined by a competent staff. In due course the winning effort was disclosed with the competitor's name. Another competitor then came forward and claimed to have sent in exactly the same line and sued for the £300. It was held in judgment that the competition was a lottery and the action was not maintainable.

Collateral Contracts.

Limerick competitions being lotteries and illegal, it follows that, as lawyers say, "collateral contracts are also tainted." Thus where such a competition was used as part of an advertising scheme undertaken by a certain firm, and the advertising agents sued the firm for the cost of inserting the advertisements, it was held that they were not entitled to recover, having themselves taken part in an illegal act.²

The Principle Involved.

These decisions no doubt depended largely on the fact that this form of competition was so popular, and the number of entries so enormous, that fair judging was regarded as physically impossible, and an element of pure chance entered to a great extent in the selection of the winner.

On these grounds only can it be possible to reconcile another decision³ where the competition was to construct a sentence illus-

¹ *Blyth v. Hulton* [1908], 24 T.L.R. 719.

² *Smith's Advertising Agency v. Leeds Laboratory Co.* [1910], 26 T.L.R. 335.

³ *Scott v. Director of Public Prosecutions* [1914], 2 K.B. 868.

trating a given word. The initial letter of each word in the sentence was to be a letter taken from the given word. A prosecution having been initiated by the police it was held that as some degree of skill was involved, and as the number of competitors was not such as to make individual consideration impossible, therefore the result did not depend entirely upon chance and the competition was not a lottery.

It is worthy of notice that this decision was given in 1914 and being several years later than the Limerick trials it may be said to embody a later development, and possibly a modification of the judicial views on the point.

A competition for the correct prediction of the number of births and deaths in London during a given week has also been held not to constitute a lottery.¹

Gratuitous Chances.

A further important element in the illegality of competitions where the result depends upon chance is the existence of entrance fees. In one case Mr. Justice Darling (as he then was) said: "I wish it to be clearly understood that I am not prepared to hold that an absolutely free and gratuitous distribution of chances, none of which have been paid for, would be a lottery."² And it has been said that "as to prize competitions by newspaper proprietors, the question is whether the competitions are schemes by which men risk money, and if successful gain money by chance. If so they are lotteries."³

Advertising Schemes are not Gratuitous.

Many newspaper advertising schemes have infringed the Lottery Acts apart from competitions. The case decided by Lord Darling which has already been referred to was of this kind.² Here a popular weekly distributed among the public gratuitously a quantity of numbered discs each one of which bore the words "Keep this, it may be worth £100; see such-and-such a newspaper published to-day."

The winning numbers were published in the newspaper, but the information could also be obtained *without charge* upon inquiry at the publisher's offices. It was held that although any one individual might obtain a prize without paying anything, yet the prize money was indirectly made up from contributions by the holders of the discs and the scheme was a lottery.

It has been held also that the offence may be committed where

¹ Hall v. Cox [1899], 1 Q.B. 198.

² Willis v. Young & Stembridge [1907], 1 K.B. 448.

³ Stone's Justices' Manual (Lotteries).

the prizes are presented, and have not been purchased out of the entrance money.¹

Similarly a scheme in which a newspaper printed "spots" of varying sizes and shapes, and offered prizes to readers who cut out and sent in the winning "spots" was declared a lottery; and the promoter was convicted as a "rogue and vagabond,"² although no money was paid beyond the price of the newspaper.

An important 1925 decision illustrates a further point. Here a publisher arranged that numbered tickets should be given to the purchasers of goods at certain shops, the winning numbers being drawn by chance, and published periodically in his newspaper. There were money prizes, and the winners had to undertake to exhibit a card advertising the newspaper in the windows of their houses for a fixed time.

On these facts it was held: first, that although the price of the goods was not increased, yet that price now included a chance in the newspaper scheme, and this constituted a sale of tickets; and secondly, the fact that the winners were obliged to render a service to the newspaper proprietor did not prevent the scheme being a lottery, since they had already been selected as prize-winners entirely by chance.³

Recovery of the Prize.

It has been seen in the missing word competition case⁴ that where the competition constitutes a lottery or infringes the Gaming Acts, the prize is not recoverable at law. In other cases, however, there is a good contract, and the fixed sum can be sued for.

Thus many years ago when influenza was apparently as much a scourge as it is to-day, an enterprising chemist offered for sale a preventive preparation called the "Carbolic Smoke Ball." Such faith had he in this specific that he undertook to pay no less than £100 to any person who should become a victim to the fell disease within a fixed time after using the smoke ball. The plaintiff carried out all instructions but nevertheless contracted influenza. It was held that she had made a good contract; that she had accepted the advertised offer by acting upon it; that the contract was not a wager, and the money was recoverable.⁵

Information Concerning Lotteries and Betting.

Publishing schemes for the sale of lottery tickets is, it will be remembered, a grave offence, quite apart from promoting the lottery.

¹ *Bartlett v. Parker* [1912], 2 K.B. 497.

² *Hall v. McWilliam* [1901], 85 L.T. 239.

³ *Kerslake v. Knight* [1925], 41 T.L.R. 555.

⁴ *Barclay v. Pearson* [1893] 2 Ch. 154.

⁵ *Carlill v. Carbolic Smoke Ball Co.* [1892], 2 Q.B. 484.

But where a newspaper article merely criticized a sweepstake in a favourable manner, giving information as to where tickets could be obtained and the prices, this was held not to constitute "publishing a proposal" contrary to the Lotteries Act 1823 and neither the editor nor the proprietor was liable.¹ It seems prudent to add that this would appear a dangerous precedent to follow, as it is more than likely that a conviction could have been obtained under the Act of 1836 for the offence of "advertising a lottery."

Unreasonable Bye-Law.

Where a County Council had passed a bye-law making it an offence to use any public place for the purpose of selling any paper devoted mainly to giving information as to the probable result of races, steeplechases, or other competitions, it was held that this bye-law was unreasonable and could not be supported.²

Publication.

Where the proposal and scheme are illegal, very little will suffice to constitute publication. Thus where sweepstake circulars were ordered from a master-printer and delivered enclosed in envelopes, it was held that the scheme had been published to his own work-people and the offence had been committed.³

¹ *Bottomley v. Director of Public Prosecutions* [1914], 31 T.L.R. 58.

² *Scott v. Pilliner* [1904], 2 K.B. 855.

³ *Dew v. Director of Public Prosecutions* [1920], 124 L.T. 246.

CHAPTER XVI.

RACING COMPETITIONS AND CIRCULARS.

As soon as one turns from competitions of the "missing word" type, to racing competitions, the legal situation changes. In most cases the racing competition is not a lottery, but it may be affected by the Gaming and Betting Acts; or it is possible that the offence of "keeping or advertising a betting-house" has been committed.

Racing and football competitions are, it need hardly be explained, for the best selections of the winners of coming events. A *sweep-stake* on the result of the Derby, organized by a licensed victualler in a public-house, is essentially different from these competitions, and has been held to constitute a lottery.¹

The following cases illustrate the primary distinction between racing competitions and those discussed in the last chapter:—

Racing Competition Not a Lottery.

A coupon competition promoted by the proprietor of a racing newspaper for best selections of the winners of six races was held not to be an offence against either the Betting Acts or the Lottery Acts.² Here *no money* had to be sent in with the coupons, and the bulk of the papers were distributed in the ordinary way by news-vendors, very few being sold direct by the promoter.

The next case sails somewhat closer to the wind, and a conviction might have been recorded if the case had been fought on other grounds. A prize of £100 was offered by the newspaper for correct forecasts of the names of the first four horses in a coming race. Coupons were to be used and were printed in the issue in question, but *additional coupons were also obtainable* by themselves at the price of one penny. The Queen's Bench Division held that "picking out the winners" was not a matter of pure chance and was not a lottery.³

The Betting Acts, 1853 and 1874.

Before considering racing competitions any further it will be necessary to examine certain provisions of the Betting Acts; and it

¹ *R. v. Hobbs* [1898], 2 Q.B. 647.

² *Caminada v. Hulton* [1891], 64 L.T. 572.

³ *Stoddart v. Sagar* [1895], 2 Q.B. 474.

may be as well to observe here that while the law does not *sanction* betting, it nowhere declares it to be illegal (whereas promoting lotteries is criminal); indeed to-day the Betting Tax definitely implies the reverse. All the law does is to condemn betting as carried on under certain specified conditions.¹

By the Betting Act of 1853, "no house, office, or other *place* is to be kept for the purpose of any person conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money being received by such person as consideration for an agreement to pay thereafter money on any contingency relating to a horse-race, fight, game, sport or exercise." A fine of £100 and six months' imprisonment are the maximum punishments.

It is also an offence under the same statute to exhibit or publish placards, handbills or advertisements of betting houses; penalty £50 and two months' imprisonment.

The Act of 1874 was passed to amend the one just considered, and adds the following offences to the section which deals with advertisements—viz.: the sending or publishing of any letter, circular, telegram, handbill or advertisement:—

(1) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information for the purpose of such betting as is mentioned in the principal Act, or will make bets.

(2) With intent to induce persons to apply at any house, office, or place for similar purposes.

(3) Inviting persons to take a share in a bet or wager.

The Gaming Acts.

These specific criminal offences connected with betting are not of themselves sufficient to *invalidate* betting contracts, so as to make bets irrecoverable at law, but this is achieved by the Gaming Acts of 1835, 1845 and 1892.

The first of these makes it law that securities given on gaming contracts are deemed to have been accepted *for an illegal consideration*.

The second makes all gaming and wagering contracts *null and void*; while the third Act deals similarly with collateral agreements to pay fees and commissions.

Stake-holders.

No action is to be brought for recovering any sum of money alleged to be won upon any wager; but it has been decided that where money has been placed with a stake-holder it is recoverable at law by the person who deposited it, unless it had already been paid over to the winner at the time the authority to pay was withdrawn.²

¹ *R. v. Brown* [1895], 1 Q.B. 119.

² *Hampden v. Walsh* [1876], 1 Q.B.D. 189-196.

It has always seemed to the present writers to be hopeless to attempt to reconcile this and earlier decisions with the words of Section 18 of the Gaming Act 1845: "No action shall be brought to recover any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

This interpretation is based upon an assumption that the Section was meant to apply *only to the non-recovery by the winner of a sum deposited by the other party* to abide the event, and not to the right of depositor to recover back his *own* deposit, if demanded before the money was paid over.

The policy of this Act is in any case different from that of the Betting Act 1853, which provides that money received by *the owner of a betting-house*, as a deposit or consideration for a bet, may be recovered in any court of competent jurisdiction. And this provision is not impliedly repealed by the later Gaming Acts,¹ so that the position is that the stake can be recovered from such a person, but not the winnings.

The same principle was applied in the Missing Word Competition mentioned previously² where the payments in one competition had amounted to no less than £23,000, and 1,358 competitors had guessed the right word. Before the prizes could be paid the competition was alleged to be illegal and the money paid into court. Mr. Justice Stirling held that the whole venture was a lottery, that the Court could not aid in distributing the fund, but that each contributor might recover his shilling from the promoter, to whom the entire sum was repaid in order that he might meet any legal claims.

Office used for Betting.

Returning now to racing competitions, it will be seen that the question is by no means concluded by the decision in which it was held that a coupon competition for selecting winning horses was not a lottery.³

Nemesis was on the track of the defendant in the last case and five years later he was again prosecuted. This time it was not for promoting a lottery, but for unlawfully keeping an office "for purpose of money being received, as the consideration for undertaking to pay money on horse-races." A conviction was secured.⁴

Betting Houses Abroad.

The practice of evading the betting laws by having offices on the Continent is well known, but the following case illustrates the danger of half-measures.

¹ Davis v. Stoddart [1902], 18 T.L.R. 260.

² Barclay v. Pearson [1893], 2 Ch. 154

³ Stoddart v. Sagar [1895], 2 Q.B. 474.

⁴ R. v. Stoddart [1901], 1 K.B. 177.

A football newspaper was published in London, and in this publication was advertised a football coupon competition promoted in an office at Middelburg in Holland. Specially high rates were charged for these advertisements, but apart from this the newspaper proprietor had no connection with or interest in the competition.

The coupons when cut out and filled in were sent with the money direct to Middelburg, but the name of the newspaper was used in the address.

The offence it will be remembered consists in keeping a house (the London newspaper office) for the purpose of receiving money for betting. A conviction against the proprietor was recorded, and upon appeal it was held in the High Court that there was evidence on which the magistrate could properly find that the office was used as an "essential part of the machinery" for receiving money for an illegal purpose and the conviction was right.¹

It appears that where the offence consists (as here) of "illegal user" of a place, the person using must have a closer connection with the newspaper than other advertisers would have.

Advertising Betting Houses.

In reference to the advertisements prohibited by the amending Betting Act of 1874, it has been held that in order to bring an advertisement within the Act it must appear by reasonable inference from the advertisement itself that it refers to betting under conditions such as are prohibited by the principal Act of 1853. This Act, it must be remembered, refers to "keeping a place" for betting purposes.

The case making clear the law on this point was one of many fought at different times by Mr. J. Hawke on behalf of the Anti-Gambling League. The advertisement on which action was taken read as follows: "T. and S., Flushing, Holland. The Derby, Ascot Stakes, Royal Hunt Cup, Northumberland Plate, etc. The Continental Sportsman, also Year Book and Ready Reckoner. Free on receipt of address. Telegraphic instructions can be sent to London. All letters to be addressed T. and S., Flushing, Holland."

The publishers were charged with causing advertisements to be published whereby it was made to appear that an office and place were used by T. & S. for the purpose of making bets, in a manner prohibited by the Betting Act 1853, and evidence was given as to bets taken subsequent to the advertisement.

A conviction having been obtained, it was held on appeal that such evidence was irrelevant; further that it did not appear from the advertisement that betting was carried on *at any place* in

¹ Mackenzie v. Hawke [1902], 2 K.B. 216.

England or Ireland and that this is the form of betting prohibited by the principal Act. The conviction therefore could not stand.¹

A similar point was made in another case which dealt with advertisements and offers of racing tips. Here again the conviction was quashed, and the learned Judge pointed out that the legislation was intended to strike at a real mischief, and to suppress betting houses. To enlarge the scope of the section in the way in which he was being asked to do, was to put an unreasonable construction upon the Act.²

The general effect of the cases is that the sending or publishing of any letter or advertisement inciting persons to bet, is an offence. It is not necessary that the person sending the letter should be the person making the bets or profiting by them.³

A measure put forward by the Government in 1927 proposes to prohibit the making of bets with bookmakers abroad on events to be determined in Great Britain, the prohibition being enforced by a penalty of £100. It is interesting to speculate on the evasions that will have to be devised to cope with this prohibition.

Football Betting Act 1920.

The Ready Money Football Betting Act 1920 provides a penalty of £25 or one month's imprisonment for printing, publishing or knowingly circulating any advertisement, circular or coupon of any ready-money football betting business, whether in the United Kingdom or elsewhere. (Subsequent offences £100 or three months.)

Two important cases were decided on this Act in the course of 1925. The first was on a point analogous to that in the "disc" and "spot" advertising schemes.⁴ A sixpenny weekly magazine containing football and racing news held coupon competitions during the winter offering £150 for ten correct forecasts of results of football matches, and £100 for nine. It appeared that the winter circulation was 32,000, falling to 8,000 in the summer, and that the vast majority of the purchasers bought the paper for the coupon. The proprietors were convicted of publishing coupons of a ready-money football betting business, contrary to the 1920 Act.⁵

This case is entirely in accord with the racing-coupon cases of twenty-five years ago. It was then said that these competitions were a form of betting, although they were not lotteries, but no offence is made out until it is shown that an office or "place"

¹ Ashley & Smith v. Hawke [1903], 89 L.T. 538.

² Cox v. Andrews [1883], 12 Q.B.D. 126.

³ Agnew v. Morley [1909], S.C.J. 41.

⁴ See p 102 *ante*.

⁵ Suttle v. Cresswell [1926], 42 T.L.R. 75.

within the meaning of the Act is kept for betting purposes.¹ This difficulty is of course removed under the new Football Betting Act.

Further, it must be remembered that the transaction is not a bet unless it is held that the price of the paper was really paid for the coupon.

Guilty Knowledge.

In the second important case interpreting this Act a printer was summoned for having unlawfully printed coupons of a ready-money football betting business. The words "to be used for credit only" were printed on the coupons, and the person who had ordered them did in fact conduct a credit-betting business.

Some of the coupons were however found to be used for ready-money betting in the streets, but there was no evidence to connect this with the person who had ordered the coupons.

A conviction was obtained, and an appeal to the High Court followed. It was clear from the judgment of the Lord Chief Justice that he regarded the words "to be used for credit only" as a sham, and that in any case the Act only requires *guilty knowledge* in respect of "circulating," and not in respect of "printing and publishing." In the latter case the printer or publisher is presumed to know the purpose for which the coupons will be used. The appeal was dismissed.²

In a 1926 case, coupons printed in Fleet Street were distributed in Monmouthshire. The printer was charged with illegal publication, but on appeal it was held that there was no evidence to connect him with the distribution. If the charge had been of printing rather than publishing, it would have succeeded.³

Betting and Loans (Infants) Act 1892.

The subject of moneylenders' circulars, which is next to be considered, has at least one point of contact with the betting advertisement question, namely, that this statute makes it illegal to send either to persons under 21.

The material words are: "If any person for the purpose of earning profit sends or causes to be sent to a person whom he knows to be an infant, any circular, notice, advertisement, letter, telegram or other document which invites or may reasonably be implied to invite the person receiving it:—

To borrow money, or to make any bet or wager,

Or to enter into any transaction involving the borrowing of money, or betting or wagering,

¹ *R. v. Stoddart* [1901], 1 K.B. 177.

² *White v. Robertson* [1925], 41 T.L.R. 484.

³ *Police v. Heath*, [1926], October 23, *Evening News*.

Or to apply to any person at any place with a view to obtaining information or advice for similar purposes ; he shall be liable upon indictment to three months' imprisonment and £100 fine ; or on summary conviction to one month and £20."

The person "from whom information may be obtained" is presumed to have sent the circulars unless he proves the contrary. If a betting circular is sent to any person at a "*place of education*," it will be presumed that the sender knows that such person is an infant unless he shows reasonable grounds for believing otherwise.¹ In respect of moneylending circulars, this presumption obtains at all times *and in all places*, until reasonable grounds for holding the contrary belief are adduced.

Moneylenders Bill.

A measure before a Standing Committee of Parliament in 1927 must be referred to. This Bill provides the same penalties as in the 1892 Act for the following offences :—

Knowingly sending or delivering moneylenders' advertisements or circulars to any person except in response to a written request,

Inserting or causing to be inserted moneylenders' advertisements in newspapers or periodicals, except such as contain only the name and the place as licensed, a statement that money is lent with or without security, and the date on which the business was first established.

Transactions brought about by contraventions of these provisions are declared to be void. Every advertisement and other document issued is to show *conspicuously* the licensed name, and also any assumed name used for registration under the Moneylenders Act 1900. Fine for each offence £20.

Circulars.

The following case shows that the word "circulars" is liable to receive a wide interpretation :—

Here a tipster sent out ten duplicated copies of a letter to ten clients who each owed him the sum of five shillings and tenpence for tips for horse races, asking for payment and referring to his business generally by promising "some more winners at long odds," these documents were held on appeal to constitute advertising circulars.²

¹ *Milton v. Studd* [1910], 2 K.B. 118.

² *Cashmore v. Smith* [1919], 83 J.P. 157.

CHAPTER XVII.

OTHER ILLEGAL PUBLICATIONS.

Sunday Observance Act 1781.

One of the old Sunday observance statutes, honoured to-day in the breach perhaps, rather than in the observance, has a section relating to printers and publishers.

"For the better preventing persons assembling on the Lord's day for irreligious purposes, be it enacted that any person advertising or causing to be advertised any public entertainment or amusement, or any public meeting for debating on any subject whatsoever, on the Lord's day, to which persons are to be admitted by the payment of money, or by tickets sold for money, and any person printing or publishing any such advertisement, shall respectively forfeit the sum of £50 for every such offence, *to any person who will sue for the same.*"

The Crown has power to remit the penalty whenever this course is expedient, under an amending Act of 1875.

Contempt of Court.

This subject which was touched upon in its relation to the law of libel must now be considered more generally.¹ The serious consideration, especially in criminal trials, is whether the course of justice may be perverted, owing to the publication complained of.

For example in one case a reporter sent to his editor articles reflecting upon the character and conduct of an accused person, this being matter which in any case would have been inadmissible in evidence against him. The editor published the articles, and the accused person was convicted and sentenced. The editor and the reporter were themselves afterwards charged and convicted "for conspiring and attempting to pervert the course of justice," by publishing the article in question.²

Where items of news which are in contempt are distributed by a news-agency, the manager is liable³ and ignorance of the contents of a publication on the part of the printer or publisher is no defence, though it "goes in mitigation."⁴

¹ See p. 49 *ante*.

² *R. v. Tibbitts & Windust* [1902], 1 K.B. 77.

³ *Re Robbins of the Press Association* [1891], 7 T.L.R. 411.

⁴ *Ex parte Jones* [1806], 13 Ves. 237.

In many of these cases, the proceedings are taken by one party to an action against the other, where the latter has made premature publications with the object of securing some special advantage.

Publishers and Contempt.

The leading case on the point concerns an infringement of a patent for nickel-plating in 1881.¹ An injunction had been obtained restraining the defendants from further infringements, and they gave notice of appeal.

They then published an advertisement in the *Birmingham Daily Post*, asking the nickel-plating trade to subscribe the necessary funds to prosecute the appeal. It was pointed out that unless the verdict was reversed no firm could continue nickel-plating by any process whatever except the plaintiffs and their licensees. In a separate advertisement £100 reward was offered to any one producing documentary evidence that nickel-plating was done previous to 1869.

The plaintiffs moved to commit the printers and publishers of the newspaper to prison for contempt of court, but they stated that they did not press for this course, and would be satisfied with an apology and an undertaking not to repeat the advertisement.

The Master of the Rolls (Jessel, M.R.) in a very able judgment enunciated several important principles of law. He said: "In order to commit *the printers and publishers* for contempt the plaintiffs must show that the advertisements themselves were *on their face* such that a person of ordinary intelligence conducting a newspaper must have known that the publication of them was an interference with the course of Justice."

He held that the advertisement itself was open to no objection as it was directed to persons having a common interest with the defendants, in resisting the claims of the plaintiffs; and that the allegation that the offer of £100 might induce people to forge documents was simply wild.

"I must add," continued the learned Master of the Rolls, "that the practice of making these motions against innocent people like the editors or publishers of newspapers ought to be discouraged; they lead to great waste of time and to a considerable amount of costs."

Newspaper proprietors will doubtless regret that this suggestion has not been acted upon more widely.

Official Secrets Acts 1911 and 1920.

These statutes have been applied on several occasions for the purpose of preventing persons who have held or are holding official positions from providing newspapers with sensational copy in

¹ *Plating Coy. v. Farquharson* [1881], 17 Ch.D. 49.

respect of matter which has come to their knowledge in the course of carrying out their duties.

It has been held that in spite of the title of these Acts, their operation is by no means restricted to the disclosure of *secret* information; and it is certainly in the public interest that something should be done to counterbalance the temptation to accept the very large sums that newspapers are willing to pay to obtain exclusive matter of this kind.

The prosecution in 1926 of an ex-governor of a London prison who had disclosed the supposed confession of a murderer before his execution will be remembered in this connection.¹

False Rumours.

Knowingly to spread or to conspire to spread any false news or rumours with intent to enhance or decry the price of goods, or the price of stocks is a misdemeanour.²

Stolen Goods.

It is a misdemeanour at common law to "compound a felony." Thus a promise not to prosecute a thief in consideration of his returning the property is a crime; and similarly an advertisement to recover "Lost Property" with the words "no questions will be asked," constitutes the offence.

Liability of Advertiser and Publisher.

The liability in respect of publications which are prohibited by statute, such as lottery advertisements, is incurred by all concerned; and no printer or publisher can be heard to say that he did not know the law was being broken. In cases of "contempt" however, as has been seen, the responsibility of the publisher depends entirely upon whether the matter is obviously and necessarily unlawful. If it is clearly in contempt, then no indemnity offered by the advertiser can be enforced, a vital consideration which must never be lost sight of.³

Contracts for Illegal Advertisements and Damages for Non-Insertion.

It has already been pointed out that such agreements are unenforceable,⁴ and if carried out by the publisher, he cannot sue

¹ Director of Public Prosecutions v. Blake [1926], December 16. *Times* newspaper.

² 7 & 8 Vic. c. 24, s. 4

55 & 56 Vic. c. 19 (repealed).

52 & 53 Vic. c. 63 (offences preserved).

³ Smith v. Clinton [1908], 25 T.L.R. 34 and see p. 52 *ante*.

⁴ Smith's Advertising Agency v. Leeds Laboratory Coy. [1910], 26 T.L.R. 335 and see pp. 95 and 101 *ante*.

successfully for the price. In other cases where a publisher omits to insert an ordinary advertisement by an oversight, after accepting the order, the amount of damages recoverable is by no means limited to the fee for insertion, but may include any fair computation of the loss of trade.¹

Crown Prerogative.

The exclusive right of the Crown to print the Bible, the Book of Common Prayer, and Acts of Parliament has been mentioned in connection with the subject of copyright. It remains only to be added that by the Evidence Act 1845, where any person prints any copy of any Private Act or of the journals of either House of Parliament, which falsely purports to have been printed by the printer to the Crown, or to either House of Parliament, he is guilty of a felony. Similarly it is a felony to tender such documents in evidence knowing them to be forged. The maximum penalty fixed by the statute is seven years' transportation, for which penal servitude is now substituted.

The service of H.M.'s Stationery Office is so excellent to-day, and its publications are so inexpensive, that there is little temptation to commit this particular crime, save with the object of producing a false version. The same however may not always be true of statutes, orders and regulations issued by the Legislatures of some of the smaller British possessions; it is therefore well to remember that the Evidence (Colonial Statutes) Act 1907 provides twelve months' imprisonment as the penalty for printing a copy, or pretended copy of any such Act, etc., which falsely purports to have been printed by the Government printer, or tendering such in evidence.

Using the Royal Arms without His Majesty's authority in connection with any business or calling is an offence under the Patents and Designs Act 1907, and punishable with a fine of £20. Lists of authorized persons are occasionally published in the *London Gazette*.

There are other statutory prohibitions against the wrongful use of titles and devices, calculated to lead to the belief that a person is employed by, or supplies goods to a member of the Royal Family;² also against the registration of marks containing representations of the Royal Arms or colourable imitations thereof, or the word "Royal" or anything calculated to give the impression that the applicant has Royal patronage.³

¹ *Marcus v. Myers & Davis* [1895], 11 T.L.R. 327.

² Patents Designs & Trade Marks Act [1883], S. 106 (unrepealed).

³ Trade Marks Rule [1906], r. 12.

APPENDIX.

Copyright Act, 1911.

[1 and 2 GEO. 5. CH. 46.]

A.D. 1911

ARRANGEMENT OF SECTIONS.

PART I.

IMPERIAL COPYRIGHT.

Rights.

Section

1. Copyright.
2. Infringement of copyright.
3. Term of copyright.
4. Compulsory licences.
5. Ownership of copyright, &c.

Civil Remedies.

6. Civil remedies for infringement of copyright.
7. Rights of owner against persons possessing or dealing with infringing copies, &c.
8. Exemption of innocent infringer from liability to pay damages, &c.
9. Restriction on remedies in the case of architecture.
10. Limitation of actions.

Summary Remedies.

11. Penalties for dealing with infringing copies, &c.
12. Appeals to quarter sessions.
13. Extent of provisions as to summary remedies.

Importation of Copies.

14. Importation of copies.

Delivery of Books to Libraries.

15. Delivery of copies to British Museum and other libraries.

Special Provisions as to certain Works.

16. Works of joint authors.
17. Posthumous works.
18. Provisions as to Government publications.
19. Provisions as to mechanical instruments.
20. Provision as to political speeches.
21. Provisions as to photographs.
22. Provisions as to designs registrable under 7 Edw. 7, c. 29.
23. Works of foreign authors first published in parts of His Majesty's dominion to which Act extends.
24. Existing works.

Applications to British Possessions.

25. Application of Act to British Dominions.
26. Legislative powers of self-governing Dominions.
27. Power of Legislatures of British possessions to pass supplemental legislation.
28. Application to protectorates.

PART II.

Section

INTERNATIONAL COPYRIGHT.

- 29. Power to extend Act to foreign works.
- 30. Application of Part II. to British possessions.

PART III.

SUPPLEMENTAL PROVISIONS.

- 31. Abrogation of common law rights.
- 32. Provisions as to Orders in Council.
- 33. Saving of university copyright.
- 34. Saving of compensation to certain libraries.
- 35. Interpretation.
- 36. Repeal.
- 37. Short title and commencement.

SCHEDULES.

CHAPTER 46.

An Act to amend and consolidate the Law relating to Copyright.

A.D. 1911

[16th December 1911.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

PART I.

IMPERIAL COPYRIGHT.

Rights.

1.—(1) Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work, if—

(a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid : and

(b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid ;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public ; if the work is unpublished, *to publish* the work or any substantial part thereof ; and shall include the sole right,—

(a) to produce, reproduce, perform, or publish any translation of the work ;

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work ;

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise ;

(d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered,

and to authorize any such acts as aforesaid.

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(3) For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works.

Infringe-
ment of
copyright.

2.—(1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:—

- (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary:
 - (ii) Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:
 - (iii) The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art:
 - (iv) The publication in a collection, mainly composed of non-copyright matter, *bonâ fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists: Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:
 - (v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries:
 - (vi) The reading or recitation in public by one person of any reasonable extract from any published work.
- (2) Copyright in a work shall also be deemed to be infringed by any person who—

- (a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or
 - (b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
 - (c) by way of trade exhibits in public; or
 - (d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends,
- any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation took place.

(3) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work, without the consent of the

owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright. A.D. 1911

3. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after his death: Term of copyright.

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

4. If at any time after the death of the author of a literary, dramatic, or musical work which has been published or performed in public a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit. Compulsory licences.

5.—(1) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Ownership of copyright, &c.

Provided that—

(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; and

(b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

(2) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent:

Provided that, where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be

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operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work.

(3) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee as respects the right so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and the provisions of this Act shall have effect accordingly.

Civil Remedies.

Civil remedies for infringement of copyright.

6.—(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

(2) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the absolute discretion of the court.

(3) In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then —

(a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work ;

(b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

7. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

9.—(1) Where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy of a work shall be deemed to be the property of the owner of the copyright, or as

Rights of owner against persons possessing or dealing with infringing copies, &c.

Exemption of innocent infringer from liability to pay damages, &c.

Restriction on remedies in the case of architecture.

impose summary penalties, shall not apply in any case to which this section applies. A.D. 1911

10. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement. Limitation of actions.

Summary Remedies.

11.—(1) If any person knowingly—

- (a) makes for sale or hire any infringing copy of a work in which copyright subsists; or
- (b) sells or lets for hire, or by way of trade exposes or offers for sale or hire any infringing copy of any such work; or
- (c) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or
- (d) by way of trade exhibits in public any infringing copy of any such work; or
- (e) imports for sale or hire into the United Kingdom any infringing copy of any such work :

Penalties for dealing with infringing copies, &c.

he shall be guilty of an offence under this Act and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not exceeding fifty pounds in respect of the same transaction; or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(2) If any person knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(3) The court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may think fit.

(4) Nothing in this section shall, as respects musical works, affect the provisions of the Musical (Summary Proceedings) Copyright Act, 1902, or the Musical Copyright Act, 1906. 2 Edw. 7.
c. 15.
6 Edw. 7.
c. 36.

12. Any person aggrieved by a summary conviction of an offence under the foregoing provisions of this Act may in England and Ireland appeal to a court of quarter sessions and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts. Appeals to quarter sessions.

13. The provisions of this Act with respect to summary remedies shall extend only to the United Kingdom. Extent of provisions as to summary remedies.

Importation of Copies.

14.—(1) Copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright, and as to which the owner of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly. Importation of copies.

89 & 40 Vict.
c. 36.

A D. 1911

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a British possession to which this Act extends of copies of works made out of that possession.

Delivery of Books to Libraries.

Delivery of
copies to
British
Museum and
other
libraries.

15.—(1) The publisher of every book published in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some dépôt in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin, and subject to the provisions of this section the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or parts of the work which may be subsequently published.

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales, shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the

book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered. A D. 1911

(7) For the purposes of this section, the expression "book" includes every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the letterpress or in the maps, prints, or other engravings belonging thereto.

Special Provisions as to certain Works.

16.—(1) In the case of a work of joint authorship, copyright shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author. Works of joint authors.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act, the work shall be treated for the purposes of this Act as if the other author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

17.—(1) In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author or, in the case of a work of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid. Posthumous works.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work. Provisions as to Government publications.

19.—(1) Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright Provisions as to mechanical instruments.

A.D. 1911 shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

(2) It shall not be deemed to be an infringement of copyright in any musical work for any person to make within the parts of His Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

- (a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; and
- (b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate hereinafter mentioned :

Provided that—

- (i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and
 - (ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced.
- (3) The rate at which such royalties as aforesaid are to be calculated shall—
- (a) in the case of contrivances sold within two years after the commencement of this Act by the person making the same, be two and one-half per cent.; and
 - (b) in the case of contrivances sold as aforesaid after the expiration of that period, five per cent.

on the ordinary retail selling price of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a halfpenny for each separate musical work in which copyright subsists reproduced thereon, and, where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing :

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the

making of such contrivances if he fails to reply to such inquiries within the A.D. 1911 prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regulations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties.

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:—

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in or omissions from the work, shall not apply:

(b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten:

(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act in respect of the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives:

(d) The saving contained in this Act of the rights and interests arising from, or in connexion with, action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section:

(e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act, where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

20. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Provision as to political speeches.

A.D. 1911 **21.** The term for which copyright shall subsist in photographs shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's dominions to which this Act extends if it has established a place of business within such parts.

Provisions as to designs registrable under 7 Edw. 7. c. 29. **22.—**(1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section eighty-six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends. **23.** If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends, shall not apply to works published after the date specified in the Order, the authors whereof are subjects or citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works.

Existing works. **24.—**(1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder :
Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine ; but the person who immediately before that date at which the right would so have expired was the owner of the right or interest shall be entitled at his option either—

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration ; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment ;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or,

if he cannot with reasonable diligence be found, advertised in the London Gazette and in two London newspapers: A.D. 1911

- (b) where any person has, before the twenty-sixth day of July nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section nineteen sub-sections (7) and (8) and of section thirty-three of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

Application to British Possessions.

25.—(1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature. Application of Act to British dominions.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

26.—(1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends. Legislative powers of self-governing dominions.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein,

A.D. 1911 shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this subsection, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this subsection, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

Power of
Legislatures
of British
possessions
to pass sup-
plemental
legislation.

27. The Legislature of any British possession to which this Act extends may modify or add to any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

Application
to protec-
torates.

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall, subject to the provisions of the Order, have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

PART II.

INTERNATIONAL COPYRIGHT.

Power to ex-
tend Act
to foreign
works.

29.—(1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

- (a) to works first published in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends;
 - (b) to literary, dramatic, musical and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects;
 - (c) in respect of residence in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;
- and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

Provided that—

- (i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I. of this Act.
- (ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;
- (iii) the provisions of this Act as to the delivery of copies of books shall not apply to works first published in such country, except so far as is provided by the Order;

- (iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities (if any) as may be prescribed by the Order; A.D. 1911
- (v) in applying the provision of this Act as to ownership of copyright, the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country;
- (vi) in applying the provisions of this Act as to existing works, the Order in Council may make such modifications as appear necessary, and may provide that nothing in those provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886.
- (2) An Order in Council under this section may extend to all the several countries named or described therein. 49 & 50 Vict.
c. 33

30.—(1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends except self-governing dominions and any other possession specified in the Order with respect to which it appears to His Majesty expedient that the Order should not apply. Application
of Part II,
to British
possessions.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like orders as under this Part of this Act His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any order any part of his dominions not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

PART III.

SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence. Abrogation
of common
law rights

32. (1)—His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests. Provisions
as to Orders
in Council.

(2) Every Order in Council made under this Act shall be published in the London Gazette and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

33. Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act. Saving of
university
copyright.
15 Geo. 3.
c. 53.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as compensation to a library for the loss of the right to receive gratuitous copies of books:

A.D. 1911 Provided that this compensation shall not be paid to a library in any year, unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

Interpreta-
tion.

35.—(1) In this Act, unless the context otherwise requires,—

- (1) "Literary work" includes maps, charts, plans, tables, and compilations;
- (2) "Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;
- (3) "Artistic work" includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;
- (4) "Work of sculpture" includes casts and models;
- (5) "Architectural work of art" means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction;
- (6) "Engravings" include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs;
- (7) "Photograph," includes photo-lithograph and any work produced by any process analogous to photography;
- (8) "Cinematograph" includes any work produced by any process analogous to cinematography;
- (9) "Collective work" means—
 - (a) an encyclopædia, dictionary, year book, or similar work;
 - (b) a newspaper, review, magazine, or similar periodical; and
 - (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;
- (10) "Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;
- (11) "Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;
- (12) "Delivery," in relation to a lecture, includes delivery by means of any mechanical instrument;
- (13) "Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be made;
- (14) "Lecture" includes address, speech, and sermon;
- (15) "Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors, administrators or assigns.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is

colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was, during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

36. Subject to the provisions of this Act, the enactments mentioned in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that schedule: Repeal.

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

37.—(1) This Act may be cited as the Copyright Act, 1911.

(2) This Act shall come into operation—

Short title
and com-
mencement

- (a) in the United Kingdom, on the first day of July, nineteen hundred and twelve, or such earlier date as may be fixed by Order in Council;
- (b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;
- (c) in the Channel Islands, at such date as may be fixed by the States of those islands respectively;
- (d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

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[CH. 46.]

Copyright Act, 1911.

[1 & 2 GEO. 5.]

SCHEDULES.

FIRST SCHEDULE.

Section 24.

EXISTING RIGHTS.

Existing Right	Substituted Right
<i>(a) In the case of Works other than Dramatic and Musical Works.</i>	
Copyright	Copyright as defined by this Act. ¹
<i>(b) In the case of Musical and Dramatic Works.</i>	
Both copyright and performing right	Copyright as defined by this Act. ¹
Copyright, but not performing right..	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright..	The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:—

“Copyright,” in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work.”

“Performing right,” in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

¹ In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen of the Copyright Act, 1842.

SECOND SCHEDULE.

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ENACTMENTS REPEALED.

Section 36.

Session and Chapter	Short Title	Extent of Repeal
8 Geo. 2. c. 13	The Engraving Copyright Act, 1734	The whole Act
7 Geo. 3. c. 38	The Engraving Copyright Act, 1767	The whole Act
15 Geo. 3. c. 53	The Copyright Act, 1775 ..	The whole Act
17 Geo. 3. c. 57	The Prints Copyright Act, 1777	The whole Act
54 Geo. 3. c. 56	The Sculpture Copyright Act, 1814	The whole Act
3 & 4 Will. 4. c. 15	The Dramatic Copyright Act, 1833	The whole Act
5 & 6 Will. 4. c. 65	The Lectures Copyright Act, 1835	The whole Act
6 & 7 Will. 4. c. 59	The Prints and Engravings Copyright (Ireland) Act, 1836	The whole Act
6 & 7 Will. 4. c. 110	The Copyright Act, 1836 ..	The whole Act
5 & 6 Vict. c. 45	The Copyright Act, 1842	The whole Act
7 & 8 Vict. c. 12	The International Copyright Act, 1844	The whole Act
10 & 11 Vict. c. 95	The Colonial Copyright Act, 1847	The whole Act
15 & 16 Vict. c. 12	The International Copyright Act, 1852	The whole Act
25 & 26 Vict. c. 68	The Fine Arts Copyright Act, 1862	Sections one to six. In section eight the words "and pursuant to any Act for the protection of copy-right engravings," and "and in any such Act as aforesaid." Sections nine to twelve
38 & 39 Vict. c. 12	The International Copyright Act, 1875	The whole Act
39 & 40 Vict. c. 36	The Customs Consolidation Act, 1876	Section forty - two, from "Books wherein" to "such copyright will expire." Sections forty-four, forty-five, and one hundred and fifty-two
45 & 46 Vict. c. 40	The Copyright (Musical Compositions) Act, 1882	The whole Act
49 & 50 Vict. c. 33	The International Copyright Act, 1886	The whole Act
51 & 52 Vict. c. 17	The Copyright (Musical Compositions) Act, 1888	The whole Act

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Section 36.

Session and Chapter	Short Title	Extent of Repeal
52 & 53 Vict. c. 42	The Revenue Act, 1889	Section one, from "Books first published" to "as provided in that section"
6 Edw. 7. c. 36	The Musical Copyright Act, 1906	In section three the words "and" "which has been registered" "in accordance with the" "provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration" "may be effected notwithstanding anything in the" "International Copyright Act, 1886"

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